

**PROMISSORY ESTOPPEL:  
COMMON LAW WINE IN CIVIL LAW BOTTLES**

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## INTRODUCTION

Every legal system employs its own methods and techniques to serve the ends of justice. That one should be precluded from contradicting his own acts or words when they have been relied on by another to his detriment is a well recognized principle in civil law. The common law utilizes the mechanism of estoppel<sup>1</sup> in order to implement this prin-

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<sup>1</sup>The word "estop" is an ancient English word which was originally equivalent to the word "stop." See G. BOWER & A. TURNER, *THE LAW RELATING TO ESTOPPEL BY REPRESENTATION* 3 (3rd ed. 1977). According to Coke, "'estoppe' cometh of the French word 'estoupe', from whence the English word stopped: and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his mouth to alledge or plead the truth ...." 2 COKE ON LITT. 352 a. See also *Delashmutt v. Teetor*, 261 Mo. 412, 169 S.W. 34, 41 (1914) ("The law has adopted the ...

ciple. Estoppel as it exists in a common law jurisdiction forms no part of the civil law vocabulary.<sup>2</sup> Similarly, there is in the civil law no counterpart to the doctrine of promissory estoppel,<sup>3</sup> and detrimental reliance

term [estoppel] from the old French estoupail, meaning a bung; and it indicates that in such a case one's mouth is plugged against the flow of truth.") Different terminological equivalents are used to express the same idea of estoppel, such as "preclusion," "foreclosure," and "bar." See, e.g., J. RANKINE, *THE LAW OF PERSONAL BAR IN SCOTLAND* 1 (1921).

<sup>2</sup>It has been observed that the term "estoppel" has dropped out of the modern French vocabulary. See J. DAWSON, *GIFTS AND PROMISES* 90 (1978). The French principle of "fin de non-recevoir," which roughly translates as "a bar to the reception of a specific plea," may, however, serve some of the functions of estoppel. For comparison of the two principles, see Wasserman, *The Doctrine of Fins De Non-Recevoir in Quebec Law* (with a Comparative Analysis of the English Doctrine of Estoppel), 34 CAN. B. REV. 641 (1956).

It has also been observed that Latin American law does not know the doctrine of estoppel. In this regard, Eder states:

Another principle of equity jurisprudence, of great practical importance, is *estoppel*. As far as I am aware, there is nothing equivalent in Latin-American law. The word "estoppel" has the same root as the Spanish *estopa*. There is a Spanish saying: "No bastan estopas para tapar tantas bocas" (caulking is not enough to stop so many mouths). And, precisely, estoppel is the conclusion reached by operation of law because the act or conduct of a person "stoppeh his mouth" to allege or assert the truth of a fact .... [E]quitable estoppel ... appears to me almost *sui generis* of Anglo-American law.

P. EDER, *A COMPARATIVE SURVEY OF ANGLO-AMERICAN AND LATIN - AMERICAN LAW* 74 (1950).

<sup>3</sup>Williston formulated the term "promissory estoppel" to mark the distinction between estoppel based on a representation of fact and estoppel based on a promise. He said:

It is generally held that a representation of fact made to a party who relies thereon with the right to so rely may not be denied by the party making the representation if such denial would result in injury or damage to the relying party.

Some courts have sought to apply [this] principle of estoppel to the formation of contracts, where, relying on a gratuitous promise, the promisee has suffered detriment. Since he relies on a promise and not on a misstatement of fact, the term "promissory" estoppel or something equivalent should be used to mark the distinction.

1 S. WILLISTON, *CONTRACTS* § 139-40 (Rev. 3rd ed. 1957)(footnotes omitted). See generally Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, n. 1 (1950). In Corbin's view, "[t]he phrase is objectionable. The word is so widely and loosely used as almost to defy definition, yet in the main it has been applied to cases of misrepresentation of facts and not to promises." 1A, A. CORBIN, *CONTRACTS*, § 204, at 232, 233 (1963). Most American courts use the terms "promissory estoppel" and "detrimental reliance" synonymously. See, e.g., *Kirkpatrick v. Seneca National Bank*, 213 Kan. 61, 515 P.2d 781, 786 (1973). Today, more modern courts prefer the term "detrimental reliance." See, e.g., *Minor v. Sully Buttes School District No. 58-2*, 345 N.W.2d 48, 50-51 (S.C. 1984); *Valley Bank v. Bowdy*, 337 N.W.2d 164, 165 (S.D. 1983). In England, the terms "equitable estoppel" and "quasi-estoppel" are sometimes used by English authorities to indicate the idea of promissory estoppel. See, e.g., O. PHILLIPS, *A FIRST BOOK OF ENGLISH LAW*, 368-369 (7th Ed. 1977); R. SUTTON & N. SHANNON, *CONTRACTS*, 79-85 (1970); Duncanson, *Equity and Obligations*, 39 MOD. L. REV. 286 (1976).

rarely constitutes a distinct ground for the enforcement of promises. This does not mean, however, that where a person is held liable at common law on the basis of estoppel, he would therefore not be liable at civil law. Various principles and rules analogous to estoppel are used in a civil-law system to protect the reliance interest.

The purpose of this article is to examine the civil law analogies to promissory estoppel. Our comparison will focus on the different areas in which promissory estoppel has been applied in American law and English law, and the equivalent solutions provided by the civil law. Special reference will be made to Louisiana law as a model of a jurisdiction of civilian heritage incorporating the concept of detrimental reliance in its civil code.<sup>4</sup> Since it was not until 1985 that the Louisiana Civil Code recognized detrimental reliance as a basis of obligations, the question arises whether a civil code contains other devices for the enforcement of promises in cases of reliance, and whether the doctrine of promissory estoppel might serve any useful purpose in such a system.

## (1) *VENIRE CONTRA FACTUM PROPRIUM*: NOTIONS OF ESTOPPEL IN CIVIL LAW

### (A) *Venire Contra Factum Proprium* Defined

Roman law knew the maxim *venire contra factum proprium non valet*, which means "no one can contradict his own act," or "no one is allowed to go against the consequences of his own act."<sup>5</sup> The doctrine of one's own act is founded on the notion that "it is not licit [for one] to enforce a right in contradiction to one's previous conduct, when that conduct, interpreted in good faith, would justify the conclusion that the

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<sup>4</sup>On the Louisiana civil law system and the influence upon it by the common law, see generally Tate, *Civilian Methodology in Louisiana*, 44 TUL. L. REV. 673 (1970); Sanders, *The Civil Law in the Supreme Court of Louisiana*, 15 LA. B.J. 15 (1967); Robertson, *The Precedent Value of Conclusions of Fact in Civil Cases in England and Louisiana*, 29 LA. L. REV. 78 (1968); Tate, *Techniques of Judicial Interpretation in Louisiana*, 22 LA. L. REV. 727 (1962); Jolowicz, *The Civil Law in Louisiana*, 29 TUL. L. REV. 491 (1955); Tucker, *The Code and the Common Law in Louisiana*, 29 TUL. L. REV. 739 (1955); Ireland, *Louisiana's Legal System Reappraised*, 11 TUL. L. REV. 585 (1937); Greenburg, *Must Louisiana Resign to the Common Law?* 11 TUL. L. REV. 598 (1937); Crabites, *Louisiana Not a Civil Law State*, 9 LOY. L. REV. 51 (1928).

<sup>5</sup>S. LITVINOFF, OBLIGATIONS, § 88 at 135 (7 La. Civ. Law Treatise 1975). See also J. PUIG BRUTAU, ESTUDIOS DE DERECHO COMPARADO, 97 (1951), quoted in *Sanders v. United Distributors, Inc.*, 405 So.2d 536, 537 n.2 (La. Ct. App. 4th Cir. 1981), writ denied, 410 So.2d 1130 (La. 1982).

right does not exist or will not be enforced.”<sup>6</sup> The doctrine applies in cases where “certain conduct by one party ... may have engendered a situation contrary to reality; that is, one [merely] apparent and [yet] by means of that appearance capable of influencing the conduct of others.”<sup>7</sup> The apparent conduct constitutes “the basis for trust by another party who may have proceeded in good faith and therefore may have acted in a manner that would cause him a detriment if his trust should remain frustrated.”<sup>8</sup>

Thus, the doctrine of *venire contra factum proprium non valet* is similar to that of equitable estoppel,<sup>9</sup> which rests on the broad principle that he who by his representation leads another to do what he would otherwise not have done or refrain from doing what he would otherwise not have done, shall not subject such person to loss, injury, or detriment. Equitable estoppel precludes a person who, by representation of fact, has induced another to change his position to his detriment or from

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<sup>6</sup>J. PUIG BRUTAU, *supra* note 5, at 111, *quoted in Sanders v. United Distributors, Inc.*, 405 So.2d at 537 n.2

<sup>7</sup>J. PUIG BRUTAU, *supra* note 5, at 112, *quoted in Sanders v. United Distributors, Inc.*, 405 So.2d at 537 n.2.

<sup>8</sup>*Id.*

<sup>9</sup>The doctrine of estoppel was recognized early at common law, then became a part of equity. Estoppel at common law was technical in its requirements and limited in its application. It made certain formal legal instruments or transactions conclusive “by matter of record, by matter in writing, and by matter *in pais*” 2 COKE ON LITT. 352a. Courts of equity fashioned another form of estoppel, quite different in concept and application from legal estoppel. In the leading case of *Horn v. Cole*, 51 N.H. 287 (1868), Chief Justice Perley distinguished legal estoppel from equitable estoppel, in what was described as “an admirable and accurate presentation.” 3 J. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE, § 802 at 181 n. 6 (5th ed. 1941). Chief Justice Perley said:

The equitable estoppel and legal estoppel agree indeed in this, that they both preclude from showing the truth in the individual case. The grounds, however, on which they do it are not only different, but directly opposite. The legal estoppel shuts out the truth, and also the equity and justice of the individual case, on account of the supposed paramount importance of rigorously enforcing a certain and unvarying maxim of the law.

...

Equitable estoppels are admitted on the exactly opposite ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth. The facts upon which equitable estoppels depend are usually proved by oral evidence; ... where the facts are clearly proved, the maxim that estoppels are odious, — which was used in reference to legal estoppels, because they shut out the truth and justice of the case, — ought not to be applied to these equitable estoppels ....

*Horn v. Cole* 51 N.H. 287, 290-292 (1868).

asserting a right or raising a defense inconsistent with his representation.<sup>10</sup> Equitable estoppel, like *venire contra factum proprium*, shifts the loss from the innocent party who originally incurred it to another who, under the law, is or should be liable for that loss.

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The same view has been expressed by Vice-Chancellor Bacon in *Keate v. Phillips*, 18 Ch. D. 560 (1881), where he said:

The common law doctrine of estoppel was ... a device which the Common-Law Courts resorted to at a very early period to strengthen and lengthen their arm, and not venturing to exercise an equitable jurisdiction over the subject before them, they did convert their own special pleading tactics into an instrument by which they could obtain an end which the Court of Chancery, without any foreign assistance, did at all times, and I hope will at all times, put into force in order to do justice.

*Id.* at 577.

For discussion of this distinction between legal estoppel or estoppel at common law and equitable estoppel, see generally H. MCCLINTOCK, *HANDBOOK OF THE PRINCIPLES OF EQUITY* § 31 at 79-80 (2nd ed. 1948), 2 F. LAWRENCE, *A TREATISE ON THE SUBSTANTIVE LAW OF EQUITY JURISPRUDENCE*, § 1046 at 1132 (1929).

It is believed that the concept of equitable estoppel was introduced to the common law in the eighteenth century by Lord Mansfield in *Montefiori v. Montefiori*, [1762] 1 Black. W. 363, 364, 96 Eng. Rep. 203 (K.B. 1762), where a note given fraudulently, to carry on a marriage treaty, was held to be good against the drawer, though rendered without any consideration. Lord Mansfield stated:

The law is, that where, upon proposals of marriage, third persons represent any thing material, in a light different from the truth, ... they shall be bound to make good the thing in the manner in which they represented it ... for no man shall set up his own iniquity as a defense, any more than as a cause of action.

*Id.* at 364. See Jones, *Change of Circumstances in Quasi-Contract*, 73 L.Q. REV. 48, 50-51 (1957). But see N. FETTER, *HANDBOOK OF EQUITY JURISPRUDENCE* 46 (1895) (arguing that equitable estoppel was adopted as a common law doctrine in the leading case of *Pickard v. Sears*, 6 Ad. & E. 469, 112 Eng. Rep. 179 (1837)).

<sup>10</sup>One of the earliest definitions of equitable estoppel appeared in *Pickard v. Sears*, 6 Ad. & E. 469, 112 Eng. Rep. 179 (1837), in which the court stated:

[W]here one by his words or conduct willfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time ....

*Id.* 6 Ad. & E. at 471, 112 Eng. Rep. at 181. This principle of estoppel has been more recently defined in the following terms:

[W]here one person ("the representor") has made a representation to another person ("the representee") in words or by acts or conduct or (being under a duty to the representee to speak or act) by silence or inaction, with the intention (actual or presumptive) and with the result, of inducing the representee on the faith of such representation to alter his position to his detriment, the representor, in any litigation which may afterwards take place between him and the representee, is estopped, as against the representee, from making, or attempting to establish by evidence, any averment substantially at variance with his former representation, if the representee at the proper time, and in the proper manner, objects thereto.

G. BOWER & A. TURNER, *supra* note 1, at 4.

## (B) Application of *venire contra factum proprium* in the Louisiana Civil Code

A close examination of the Louisiana Civil Code reveals several applications of the doctrine of *venire contra factum proprium*, or "equitable estoppel." For instance, although the code does not use these terms,<sup>11</sup> it protects the reliance interest of a contracting party who relies to his detriment upon a misrepresentation by a minor of his age.<sup>12</sup> The Code also protects a third party who relies upon the apparent authority of an agent<sup>13</sup> and the tenant who continues in possession of leased pre-

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The most famous and often quoted enumeration of the elements of equitable estoppel is that of Pomeroy, who states as follows:

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; in other words, he must so act that he would suffer a loss if he were compelled to surrender or forego or alter what he has done ...." J. POMEROY, *supra* note 9, s805 at 191-192.

Thus, the promissory nature of the statement distinguishes promissory estoppel from equitable estoppel. On this distinction, *see, e.g.*, *First Fed. Sav. & Loan v. Perry's Landing*, 11 Ohio App. 3, 13, 463 N.E.2d 636, 648 (1983); *Valley Bank v. Dowdy*, 337 N.W.2d 164, 165 (S.D. 1983); *O'Connell v. Entertainment Enterprises*, 317 N.W.2d 385, 389 (N.D. 1982); *Johnson v. Gilbert*, 621 P.2d 916, 919 (Ariz. Ct. App. 1980); *Com. Dept. of Pub. Wel. v. Sch. District*, 49 Pa. Commw. 316, 410 A.2d 1311, 1314 (1980).

<sup>11</sup>For an early attempt to trace the various applications of estoppel in the Louisiana Civil Code, *see* Comment, *Estoppel in the Law of Quebec (With references to the Civil Code of Louisiana)*, 5 TUL. L. REV. 615 (1931).

<sup>12</sup>LA. CIV. CODE art. 1924, which provides: "The mere representation of majority by an unemancipated minor does not preclude an action for rescission of the contract. When the other party reasonably relies on the minor's representation of majority, the contract may not be rescinded."

Comment (b) states: "Under this article, a contract made with a minor who represents himself as of age is valid for the benefit of the contracting party who relied in good faith upon that representation." *See, e.g.*, *Guidry v. Davis*, 6 La. Ann. 90, 92 (1851): "It is an error to suppose that the law can sanction the perpetration of frauds by minors; the truth and reality of bona fide transactions are as binding upon them as upon majors."

<sup>13</sup>The Louisiana Civil Code contains several articles which give legal effect to apparent authority.

LA. CIV. CODE art. 3010: "The attorney can not go beyond the limits of his procuration; whatever he does exceeding his power is null and void with regard to the

mises after his lease has expired.<sup>14</sup> Similarly, the Louisiana Insurance Code protects an insured who has violated the terms of his insurance policy if such violation was known to the insurance agent who nonetheless made no objection.<sup>15</sup>

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principal, unless ratified by the latter, and the attorney is alone bound by it in his individual capacity."

LA. CIV. CODE art. 3012: "The mandatary, who has communicated his authority to a person with whom he contracts in that capacity, is not answerable to the latter for anything done beyond it, unless he has entered into a personal guarantee."

LA. CIV. CODE art. 3013: "The mandatary is responsible to those with whom he contracts, only when he has bound himself personally, or when he has exceeded his authority without having exhibited his powers."

LA. CIV. CODE art. 3021: "The principle is bound to execute the engagements contracted by the attorney, conformably to the power confided to him. For anything further he is not bound except in so far as he has expressly ratified it."

LA. CIV. CODE art. 3029: "If the principal only notifies his revocation to the attorney, and not to the persons with whom he has empowered the attorney to transact for him, such persons shall always have the right of action against the principal to compel him to execute or ratify what has been done by the attorney; the principal has, however, a right of action against the attorney."

On the concepts of agency by estoppel and apparent authority at common law, see RESTATEMENT (SECOND) OF AGENCY, § 8B (1957).

See generally REUSCHLEIN & GREGORY, AGENCY AND PARTNERSHIP § 14 at 33-40 (1979); SELL, AGENCY § 5 at 4-5 (1975); SEAVEY, AGENCY § 8E at 14, 15 (1964); MECHEM, AGENCY, § 87-88 (4th ed. 1952); SEAVEY, STUDIES IN AGENCY 194 (1949); TIFFANY, AGENCY § 16 at 37-45 (1924); Note, *Binding the Insurer--Apparent Authority and Estoppel in Virginia*, 27 WASH. & LEE L. REV. 93 (1970); Comment, *The Objective Theory of Agency: Apparent Authority and the Estoppel of Apparent Ownership*, 47 NEB. L. REV. 678 (1968); Comment, *Agency--Recovery in Tort Under the Theory of Apparent Authority or Agency by Estoppel*, 69 W. VA. L. REV. 186 (1970); Rubenstein, *Apparent Authority: An Examination of a Legal Problem*, 44 A.B.A. J. 849 (1958); Cook, *Agency by Estoppel: A Reply*, 6 COLUM. L. REV. 34 (1906); Ewart, *Agency by Estoppel*, 5 COLUM. L. REV. 354 (1905); Cook, *Agency by Estoppel*, 5 COLUM. L. REV. 36 (1905).

<sup>14</sup>According to LA. CIV. CODE art. 2688:

If, after the lease of a predial estate has expired, the farmer should still continue to possess the same during one month without any step having been taken, either by the lessor or by a new lessee, to cause him to deliver up the possession of the estate, the former lease shall continue subject to the same clauses and conditions which it contained; but it shall continue only for the year next following the expiration of the lease.

Similarly, LA. CIV. CODE art. 2689 provides:

If the tenant either of a house or of a room should continue in possession for a week after his lease has expired, without any opposition being made thereto by the lessor, the lease shall be presumed to have been continued, and he cannot be compelled to deliver up the house or room without having received the legal notice or warning directed by article 2686.

<sup>15</sup>Under the Louisiana Insurance Code:

No policy of fire insurance issued by any insurer on property in this state shall hereafter be declared void by the insurer for the breach of any representation, warranty or condition contained in the said policy or in the application therefore. Such breach shall not avail the insurer to avoid liability unless such breach (1) shall exist at the time of the loss, and be either such a breach as would increase either the moral or physical hazard under the policy,



Louisiana law also recognizes other concepts of estoppel. Estoppel by judgment,<sup>16</sup> for instance, is incorporated in the more general doctrine of *res judicata*,<sup>17</sup> and a species of estoppel by deed<sup>18</sup> is embodied in the doctrine of *bona fide purchaser*.<sup>19</sup>

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or (2) shall be such a breach as would be a violation of a warranty or condition requiring the insurer to take and keep inventories and books showing a record of his business. Notwithstanding the above provisions of this section, such a breach shall not afford a defense to a suit on the policy if the fact or facts constituting such a breach existing at the time of the issuance of the policy and were, at such time, known to the insurer or to any of his or its officers or agents, or if the fact or facts constituting such a breach existed at the time of the loss and were, at such a time, known to the insurer or to any of his or its officers or agents, except in case of fraud on the part of such officer or agent or the insured, or collusion between such officer or agent and the insured.

LA. REV. STAT. § 22:692.

It must be noted, however, that the operation of this statutory provision does not depend on the existence of detriment on the insured's side. See generally Comment, *Waiver and Estoppel in Louisiana Insurance Law*, 22 LA. L. REV. 202 (1961)

<sup>16</sup>Justice Field, in a famous statement, defined estoppel by judgment as a branch of the more general doctrine of "*res judicata*". He said:

In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose ... Such demand or claim, having passed into judgment, cannot again be brought into litigation between the parties in proceedings at law upon any ground whatever.

But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered.

*Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1877). On the effect of a former adjudication, see RESTATEMENT (SECOND) OF JUDGMENTS § 17 (1982).

<sup>17</sup>For instance under LA. REV. STAT. § 13:4947:

The judgment of the court, confirming and homologating the sale, shall have the force of *res judicata*, and operates as a complete bar against all persons, whether of age or minors, whether present or absent, who may thereafter claim the property sold, in consequences of all illegality or informality in the proceeding, whether before or after judgment. The judgment of homologation shall in all cases be received and considered as full and conclusive proof that the sale was duly made according to law, in virtue of a judgment or order legally and regularly pronounced on the interest of parties duly represented.

<sup>18</sup>Estoppel by deed, or as it was traditionally called, "estoppel by matter in writing" precludes a party to a deed from denying any statement written in the deed, or disputing its force and effect, or claiming a right in contradiction therewith. Here estoppel applies only against the parties to the deed and those in privity with them. It is limited to questions directly concerning the deed. The deed, however, must be valid since an estoppel cannot be created by a void deed. See M. BIGELOW, *A TREATISE ON THE LAW OF ESTOPPEL AND ITS APPLICATION IN PRACTICE* 332-352 (5th ed. 1890). Estoppel by deed is regarded by some authorities as a subdivision of a more general doctrine of "estoppel by convention." See G. BOWER AND A. TURNER, *supra* note 1, at 157.

### (C) Application of "venire contra factum proprium" in Louisiana

In practice, the Roman doctrine of "venire contra factum proprium" to date has had very limited impact on the Louisiana jurisprudence. The courts have not made use of the doctrine as a general theory. Only three courts, to this writer's knowledge, have referred to the doctrine. In *Davilla v. Jones*,<sup>20</sup> a lessee wrote his lessor requesting repairs

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The writers argue that the only difference between estoppel by deed and estoppel by convention is that "estoppels by deed have historically been justified not only on the ground of convention, which in modern times is seen as their true source of authority, but by the deliberation and the solemnity in form of the deed from which they spring." *Id.* at 161. *Contra* R. WALKER & M. WALKER, *THE ENGLISH LEGAL SYSTEM* 595-596 (6th ed. 1985). The latter writers consider "estoppel by convention" or, as they call it, "estoppel by agreement," as a form of estoppel of conduct (i.e., equitable estoppel) to be distinguished from "estoppel by deed," which they place in a class by itself.

One of the most important applications of estoppel by deed is title by estoppel. Under this form of estoppel, where a deed is executed and delivered by a person with no title to the described property, or by one who has a lesser interest than the deed purports to convey, the grantor and his successors are denied the right to assert any "after-acquired title" against the grantee and his successors. When, later, a grantor acquires part or all of the title, the "after-acquired title" passes to the grantee and his successors. *See e.g.*, *Southland Corp. v. Shulman*, 331 F.Supp. 1024, 1029 (D. Md. 1971); *McNeal v. Bonnel*, 412 S.W.2d 167, 171 (Mo. 1967); *Robben v. Obering*, 279 F.2d 381, 383 (7th Cir. 1960); *Aure v. MacKoff*, 93 N.W.2d 807, 811, 812 (N.D. 1958); *Guy v. Poss*, 212 Ga. 724, 95 S.E.2d 682, 684 (1956); *Wellman v. Tomlin*, 140 W. Va. 342, 84 S.E.2d 617, 620 (1954); *Haab v. Moorman*, 332 Mich. 126, 50 N.W.2d 856, 864 (1952); *Skelley Oil Co. v. Butner*, 201 Okla. 372, 205 P.2d 1153, 1156 (1949); *Watson v. Goldsmith*, 205 S.C. 215, 31 S.E.2d 317, 320 (1944); *Frawley v. Forrest*, 310 Mass. 446, 38 N.E.2d 631, 634 (1941); *Ayer v. Philadelphia & Boston Face Brick Co.*, 159 Mass. 84, 34 N.E. 177, 178 (1893). *See generally* R. CUNNINGHAM, W. STOEBOCK & D. WHITMAN, *THE LAW OF PROPERTY* § 11-5, at 745 (1984); 6A G. POWELL, *THE LAW OF REAL PROPERTY* 927 (1980); C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* 59-64 (2d ed. 1947); *Feinbaum, The Recent Recognition of the Doctrine of Estoppel by Lease in Massachusetts*, 17 NEW ENG. L. REV. 603 (1982).

<sup>19</sup>According to LA. REV. STAT. § 9:2756:

All sales, contracts and judgments affecting immovable property, which shall not be recorded, shall be utterly null and void, except between the parties thereto.

The recording may be made at anytime, but shall only affect third persons from the time of recording. The recording shall have effect from the time when the act is deposited in the proper office, and endorsed by the proper officer.

Another formulation of the bona fide purchaser doctrine appears in LA. REV. STAT. § 9:2721. It provides that:

No sale, contract, counter letter, lien, mortgage, judgment, surface lease, oil, gas or mineral lease or other instrument of writing relating to or affecting immovable property shall be binding on or affect third persons or third parties unless and until filed for registry in the office of the parish recorder of the parish where the land or immovable is situated; and neither secret claims or equities nor other matters outside the public records shall be binding on or affect such third parties.

<sup>20</sup>418 So.2d 724 (La. Ct. App. 4 Cir. 1982).

to the wall and roof of the leased premises, in default of which he would have the repairs done and deduct the cost from future rent. The lessor repaired only the roof. Again the lessee sent a letter concerning the wall, advising that he would continue to withhold rent until enough had accumulated to employ a contractor. The lessee next sent the lessor two bids quoting prices for the repair, but the lessor stated that she would like to get one more reasonable estimate. The lessor sent a contractor to quote a price, but nothing further was done. The lessor then served an eviction notice upon the lessee alleging nonpayment of rent for nine months. In holding that the lessor was not entitled to evict the lessee, the court said, "We conclude, on the civil law estoppel doctrine of *venire contra factum proprium non valet* ... that our lessor cannot be allowed to evict our lessee for failing to actually spend the withheld rent on repairs when it was the lessor herself who importuned the lessee to delay those repairs."<sup>21</sup> The court continued, "Nor can the lessor evict for the rents withheld after the lessee's letter ... because the parties were at all time negotiating for the repairs that the lessee could under the law have made without attempting to accommodate the lessor's desire to have them done as inexpensively as possible."<sup>22</sup> The court also noted that "at no time did the lessor demand that the rents be paid nor herself undertake the wall repairs."<sup>23</sup>

A similar estoppel analysis was applied in an English case which laid the foundation for promissory estoppel in England.<sup>24</sup> In *Hughes v.*

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<sup>21</sup>*Id.* at 725.

<sup>22</sup>*Id.* Under LA. CIV. CODE art. 2694, the lessee has the right to make repairs upon lessor's failure to make them. The article states that:

If the lessor do not make the necessary repairs in the manner required ..., the lessee may call on him to make them. If he refuse or neglect to make them, the lessee may himself cause them to be made, and deduct the price from the rent due, on proving that the repairs were indispensable, and that the price which he has paid was just and reasonable.

<sup>23</sup>*Davilla v. Jones*, 418 So.2d 724, 725 (La. Ct. App. 4 Cir. 1982).

<sup>24</sup>On the development and operation of promissory estoppel in England, see generally W. ANSON, *LAW OF CONTRACTS* 98-109 (26th ed. 1984); P. ATIYAH, *AN INTRODUCTION TO THE LAW OF CONTRACT* 123-128 (3d ed. 1981); F. DAVIES, *CONTRACT* 35-39 (3d ed. 1977); 1 J. CHITTY, *CONTRACTS* 92-96 (24th ed. 1977); G. CHESHIRE & C. FIFOOT, *LAW OF CONTRACT* 83-97 (9th ed. 1976); R. SUTTON & N. SHANNON, *CONTRACTS* 79-85 (7th ed. 1970); J. WILSON, *PRINCIPLES OF THE LAW OF CONTRACT* 60-65 (1957); K. SUTTON, *CONSIDERATION RECONSIDERED* (1974); Teh, *Promissory Estoppel as a Sword*, 13 *ANGLO-AM. L. REV.* 45 (1984); Thompson, *From Representation to Expectation: Estoppel as a Cause of Action*, 42 *CAMBRIDGE L.J.* 257 (1983); Hickling, *Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well?* 17 *U.B.C. L. REV.* 183, 184-90 (1983); Simpson, *Promises Without Consideration and Third Party Beneficiary Contracts in American and*

*Metropolitan Ry.*,<sup>25</sup> decided in 1877, the plaintiff gave notice to the defendant lessee to repair the premises within six months. The lease provided that the lessee would keep the premises in repair; otherwise the lease would be forfeited. One month later, the parties entered into negotiations for the purchase of the leasehold interest by the defendant. Because of disagreement over the price, the negotiations did not ripen into a sale. During these negotiations, the defendant lessee did nothing to further the repairs. When the six month notice had expired, plaintiff brought an action for eviction. The court held that defendant was entitled in equity to relief from forfeiture on the ground that the negotiations had suspended the operation of the original notice, and that the negotiations amounted to an implied assurance by the plaintiff that he would not enforce his right to compel forfeiture upon the expiration of the notice.<sup>26</sup> The court declared that:

[It] is the first principle upon which all courts of equity proceed that if parties who have entered into definite and distinct terms involving legal results, certain penalties or legal forfeiture, afterwards by their own act or with their own consent, enter upon a course of negotiation which has the effect of leading one of the parties to suppose that the strict rights arising under the contract will not be enforced, or will be kept in suspense, or held in abeyance, the person who otherwise might have enforced those rights will not be allowed to enforce them when it would be inequitable having regard to the dealings which have thus taken place between the parties.<sup>27</sup>

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*English Law*, 15 INT. & COMP. L.Q. 835 (1966); Jackson, *Estoppel as a Sword*, 81 L.Q. REV. 84 & 223 (2 pts. 1965); Wilson, *A Re-Appraisal of Quasi-Estoppel*, CAMBRIDGE L.J. 93 (1965); 21 Northey, *The "High Trees" Principle*, 1954 N.Z. L.J. 324, 325 (2 pts.); Mitchell, *Recent Trends in the English Law of Contract*, 2 U. WEST. AUST. L. REV. 255 (1953); Sheridan, *Equitable Estoppel Today*, 15 MOD. L. REV. 325 (1952); Denning, *Recent Developments in the Doctrine of Consideration*, 15 MOD. L. REV. 1 (1952); Wilson, *Recent Developments in Estoppel*, 67 L.Q. REV. 330 (1951).

<sup>25</sup>2 App. Cas. 439 (1877).

<sup>26</sup>*Id.* at 442-454.

<sup>27</sup>*Id.* at 448. Eleven years later, in *Birmingham & District Land Co. v. London and North Western R. Co.*, 40 Ch. D. 268 (1888), a landlord entered into negotiations for the sale of part of leased land to a railway company. The lease in question provided that unless the building held by the lessee was completed by a certain date, the lease was to be forfeited. However, the landlord asked the lessee to stop building until the outcome of negotiations were determined. Relying upon the landlord's explicit request,

Returning to the Louisiana jurisprudence, Louisiana courts in two other cases did not rely exclusively on the doctrine of "venire contra factum proprium" as in the *Davilla* decision. In *Sanders v. United Distributors*,<sup>28</sup> an employee elected to accept early retirement in reliance on his employer's representation that pension rights would not be affected by the early retirement. The representation turned out to be erroneous. The court phrased the issue as "whether plaintiff in fact suffered any detriment because of reliance upon defendant's erroneous representation of the amount of plaintiff's pension."<sup>29</sup> The court then discussed four possible theories of liability: "equitable estoppel, promissory estoppel, delictual liability and venire contra factum proprium."<sup>30</sup> Without specifying which theory it did rely upon, the court concluded that "whatever the theory of recovery, plaintiff must prove something akin to injurious reliance."<sup>31</sup>

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the lessee stopped construction. The specified date for the completion of the building passed without the lessee complying with the provisions of the lease. The landlord brought an action for ejectment on the basis that the lessee had no further interest in the land. The Court held that the landlord's request had amounted to an implied promise not to enforce the condition in the lease, and that the lessor's duty to build was suspended until a reasonable time after the termination of negotiations between the landlord and the railway company. In so holding, the Court applied the *Hughes v. Metropolitan R. Co.* principle, stating that

[T]he proposition ... amount[s] to this that if persons who have contractual rights against others induce by their conduct those against whom they have such rights to believe that such rights will either not be enforced or will be kept in suspense or abeyance for some particular time, those persons will not be allowed by a Court of Equity to enforce the rights until such time has elapsed, without at all events placing the parties in the same position as they were before. That is the principle to be applied.

*Id.* at 286.

On the application of promissory estoppel to promises of lease in the American law, *see, e.g.*, *Greenstein v. Flatley*, 474 N.E.2d 1130 (Mass. App. 1985) (damages awarded on basis of promissory estoppel in an action brought by purported tenants against office building owner. The owner led plaintiffs to believe that they had a lease for an office suite and then disavowed the existence of the promise one month before its scheduled commencement); *Southwest Craft Center v. Heilner*, 670 S.W.2d 651 (Tex. Ct. App. 1984) (where a lease allegedly provided that the tenant would assume responsibility for security of the leased premises, the tenant was not precluded from bringing an action against the landlord, who impliedly promised to provide insurance for all thefts except shoplifting).

<sup>28</sup>405 So.2d 536 (La. Ct. App. 4th Cir. 1981), *writ denied*, 410 So.2d 1130 (La. 1982).

<sup>29</sup>*Id.* at 537.

<sup>30</sup>*Id.*

<sup>31</sup>*Id.* In American law, promissory estoppel has been utilized to give effect to an employee's reliance on a promise of a pension. In the leading case, *Feinberg v. Pfeiffer*, 322 S.W.2d 163 (Mo. Ct. App. 1959), *Feinberg* (plaintiff) was an employee of the Pfeiffer Company. She began working in 1910 and, in 1947, the board of directors adopted a resolution approving payment to plaintiff of \$200 per month for life

Finally, in *Hebert v. McGuire*,<sup>32</sup> plaintiff, a doctor, sued the defendant for an unpaid surgery fee. The defendant asserted the defense that the doctor's employee had promised to file her insurance claim but failed to do so, and further that the employee failed to notify her that her bill was overdue until it was too late for her insurer. The court said that "[t]his may not be a simple estoppel,"<sup>33</sup> as the promise was made before the surgery took place, but after pointing out that it was arguable that the promise was part of an enforceable contract by an ostensibly authorized agent,<sup>34</sup> the court then went on to say that even though the promise had been made after the debt for the surgery was incurred, "it would be a clear case of a gratuitous promise, as to which estoppel (or the civil law doctrine against contravening one's own acts) would, however, reasonably apply."<sup>35</sup>

Louisiana courts have been even less receptive to the idea of detrimental reliance as a basis of liability when expressed in common-law estoppel terms.<sup>36</sup> In the famous case of *Ducote v. Oden*,<sup>37</sup> plaintiff

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after her retirement, in recognition of her long and faithful service. In 1949 she retired. After paying the above amount for several years the Company decided to reduce it to \$100. When plaintiff refused to accept the reduced amount, the Company terminated all further payments. Relying upon Section 90 of the Restatement of Contracts, the Court held for plaintiff on the basis of detrimental reliance. A great number of cases has followed the Feinberg decision. See, e.g., *Pineman v. Oechslin*, 488 A.2d 803 (Conn. 1985); *Rynar v. Ciba-Geigy Corp.*, 560 F.Supp. 619 (E.D. Ill. 1983), *Vastoler v. American Can Co.*, 700 F.2d 916 (3rd Cir. 1983); *Landro v. Glendenning Motorways, Inc.*, 625 F.2d 1344 (8th Cir. 1980); *Oates v. Teamster Affiliates Pension*, 482 F.Supp. 481 (D.D.C. 1979); *Anthony v. Ryder Truck Lines, Inc.*, 466 F.Supp. 1287 (E.D. Penn. 1979); Note, *Pension Plans and the Rights of the Retired Workers*, 70 Colum. L. Rev. 909 (1970); Note, *Legal Problems of Private Pension Plans*, 70 HARV. L. REV. 490 (1957); Note, *Contractual Aspects of Pension Plan Modification*, 56 COLUM. L. REV. 251 (1956); Comment, *Consideration for the Employer's Promise of a Voluntary Pension Plan*, 23 U. CHI. L. REV. 96 (1955); Note, *Legal Status of Private Industrial Pension Plans*, 53 HARV. L. REV. 1375 (1940); Note, *Contracts: Sufficiency of Consideration for Industrial Pension*, 11 N.C. L. REV. 340 (1933); Cloud, *Industrial Pensions: Are They "Gift" or "Pay"?*, 7 NAT. INCOME TAX MAG. 428 (1929).

<sup>32</sup>447 So.2d 64 (La. Ct. App. 4th Cir. 1984).

<sup>33</sup>*Id.* at 65.

<sup>34</sup>*Id.*

<sup>35</sup>*Id.* (citation omitted).

<sup>36</sup>See, e.g. *Wilkinson v. Wilkinson*, 323 So.2d 120, 126 (La. 1975) ("Estoppels are not favored in our law"); *Rodden v. Davis*, 293 So.2d 578, 582 (La. Ct. App. 3rd Cir. 1974), cert. denied, 296 So.2d 832 (La. 1974) ("The cases holding that estoppel is not favored by our courts are legion.")

To be sure, on a number of occasions detrimental reliance has provided the basis for enforcement of promises in Louisiana. In the early case of *Choppin v. Labranche*, 48 La. Ann. 1217, 20 So. 681 (1896) defendant, owner of a tomb, promised plaintiff that he could bury his family within, and that the remains could stay there forever. Defendant, however, attempted to remove the remains. In holding his promise to be binding the Court said: "There was by his words and still more by his conduct, the

was employed to remove overburden from defendant's gravel pit. Defendant allegedly promised him that his employment was to last three years. On the faith of this promise, plaintiff alleged that he incurred substantial expenses buying equipment necessary to carry on the work. Defendant, however, terminated the employment within seven months. Plaintiff argued that the defendant should have reasonably expected that his promise would induce the substantial change in plaintiff's position, and that enforcement of the promise was necessary to avoid injustice. The Louisiana Supreme Court rejected the plaintiff's detrimental reliance contentions, asserting that "such a theory is unknown to our law and counsel has not attempted to show its applicability under the provisions of the civil code, by which we are bound in suits of this type."<sup>38</sup>

A civilian scholar commenting on the case praised the decision, stating that "some of the cases from common law jurisdictions demonstrate misapplications of section 90 (of the Restatement of Contracts) sufficiently flagrant to have given the draftsmen of that section cause to doubt the wisdom of its inclusion or the choice of language it con-

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manifestation of his purpose that the remains ... should have a final resting place in this tomb, and on faith of that purpose, so distinctively avowed, these plaintiffs permitted the transfer of the remains of their dead ...." *Id.* at 1218, 20 So. at 682. The Court concluded that "The principle of estoppel, so often applied in controversies involving pecuniary rights, will not permit the withdrawal of promises or engagements on which another has acted." *Id.*

Again, in *Southern Discount Co. v. Williams*, 226 So.2d 60 (La. Ct. App. 4th Cir. 1969) an attorney promised to permit his opponent additional time to answer a suit, even though the Court had not formally ordered an extension of time. The Court held the promise enforceable stating that:

Even assuming for argument's sake that plaintiff's promise of time was without cause or consideration, plaintiff is estopped to repudiate that promise because defendant relied on it to her detriment: she could, with consummate ease, have obtained any reasonable extension from the Court itself and prevented plaintiff from defaulting her, and no doubt would have done so had plaintiff refused to allow her time.

*Id.* at 62. See also *Brunt v. Standard Life Ins. Co.*, 259 So.2d 575 (La. Ct. App. 1st Cir. 1972); *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 447 F.2d 1041 (5th Cir. 1971); *Robinson v. Standard Oil Co.*, 180 So. 237 (La. Ct. App. 1st Cir. 1938); *Harding v. Metropolitan Life Ins. Co.*, 188 So. 177 (La. Ct. App. Orl. Cir. 1939); *Robinson v. Standard Oil Co.*, 180 So. 237 (La. Ct. App. 1st Cir. 1938). In two cases, the Louisiana courts referred to the possibility of applying promissory estoppel, but the requirements of the doctrine were not satisfied. See *Whitehall Oil Co. v. Boagni*, 255 La. 67, 229 So.2d 702, 705 (La. 1969) ("Conceding *arguendo* that an estoppel could be applied in a case such as this, there is not evidence whatsoever in the record ... that the defendants have in any way changed their positions to their detriment or that they have been placed in a disadvantageous position ...."); *Ins. Co. of North Am. v. Sentinel Safety Sys.* 437 So.2d 915, 918 (La. Ct. App. 2d Cir. 1983).

<sup>37</sup>221 La. 227, 59 So.2d 130 (1952).

<sup>38</sup>*Id.* at 234, 59 So.2d at 132.

tains."<sup>39</sup> He continued: "It is heartening that our court is not willing to succumb to its wiles."<sup>40</sup> The same view has also been expressed in France. Professor René David, comparing consideration with cause, concludes without explanation that "[t]he doctrine of quasi estoppel (or promissory estoppel) would not serve any useful end, and it is consequently unknown to French law."<sup>41</sup> The validity of this statement will be tested in the area of gratuitous promises, where promissory estoppel has been applied successfully in American law to provide an alternative basis of liability.

## (2) CAUSE VS. CONSIDERATION: THE PROBLEM OF ENFORCING GRATUITOUS PROMISES

### (A) Cause and Consideration

Unlike the doctrine of equitable estoppel, promissory estoppel has originated as a contract concept,<sup>42</sup> supplying a substitute for the common-law doctrine of consideration. Contract law has developed as a commercial instrument<sup>43</sup> designed to enforce promises which are part of

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<sup>39</sup>Smith, *The Work of the Louisiana Supreme Court for the 1951-1952 Term, Conventional Obligations*, 13 LA. L. REV. 236, 241 (1953).

<sup>40</sup>*Id.* See also Comment, *Promissory Estoppel and Louisiana*, 31 LA. L. REV. 84, 85 (1970) stating that "Louisiana contract law is based upon the civil law and is thus governed by the provisions of the Civil Code. Thus, if such promises are enforceable, they must be so only under the provisions of the Louisiana Civil Code." *But see* Herman, *Detrimental Reliance in Louisiana Law - Past, Present and Future[?]: The Code Drafter's Perspective*, 58 TUL. L. REV. 707, 717 (1984), stating that "Intellectual independence, it is submitted, deserves applause; slavish resistance to 'outside' influences does not."

<sup>41</sup>R. DAVID, *ENGLISH LAW AND FRENCH LAW, A COMPARISON IN SUBSTANCE* 106 (1980).

<sup>42</sup>Promissory estoppel was not a part of the traditional law of estoppel. Because of its connection with promises, courts felt that the law of contract was better equipped to deal with reliance on a promise. *See e.g.*, *Jones v. Parker*, 67 Tex. 76, 82, 3 S.W. 222, 225 (1886): "A promise to do something in the future may constitute a contract capable of being enforced, but does not work an estoppel upon the person making it". Pomeroy expressed this view, saying that, "A statement concerning future facts would either be a mere expression of opinion, or would constitute a contract and be governed by rules applicable to contracts." Pomeroy, *supra* note 9, at 207-208.

Reliance upon a promise — as opposed to a statement of fact — was perceived as unreasonable. The traditional justification for this distinction rested upon the assumption that a promise to bring about an act in the future is, by nature, uncertain and liable to change, and consequently could not be a proper basis upon which a person could reasonably be guided in his conduct. *See e.g.* *Langdon v. Doud*, 10 Allen 433, 437 (Mass. 1865); *White v. Ashton*, 51 N.Y. 280, 285 (1873); *Jackson v. Allen*, 120 Mass. 64, 69 (1876); *Union Mutual Life Insurance Company v. Mowry*, 96 U.S. 544, 547-548 (1877); *Prescott v. Jones*, 69 N.H. 305, 41 A. 352, 353 (1898).

<sup>43</sup>*See* Swan, *Consideration and the Reason for Enforcing Contracts*, 15 U.W.O.L. REV. 83, 108 (1976); Note, *Judicial Theories of the Enforceability of Chari-*



the exchange process.<sup>44</sup> Consideration, as a necessary element for the enforcement of a contract, was narrowly defined as a bargain. For consideration to be present, something in exchange for the promise must be given to the promisor.<sup>45</sup> Consideration, therefore, was mainly designed to distinguish simple promises, which are part of the exchange process and thus worthy of enforcement, from those which are unbargained for and unworthy of legal protection.<sup>46</sup>

In the civil law, cause is the conceptual equivalent to consideration.<sup>47</sup> Cause originated "in the process of breaking the limitations imposed by the strict formalism of Roman Law."<sup>48</sup> With cause, a declaration of will is legally enforceable whether or not the parties have met the rigid requirements of form. The notion of cause, therefore, functions

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*table Subscriptions*, 28 COLUM. L. REV. 642, 646 (1928). *But see* Friedman, who argues that the commercial character of contract law is not invariably true if one takes into account: (1) the fact that consideration by itself is not enough to establish a contract if the parties explicitly or implicitly did not intend to create a legal relationship; (2) the rule that courts do not generally inquire into the adequacy of consideration; and (3) cases of commercial transactions, such as commercial letters of credit, which are binding even in the absence of consideration. Friedman, *The Basis of Contractual Obligation: An Essay in Speculative Jurisprudence*, 7 LOY. L.A.L. REV. 1, 3-5 (1974).

<sup>44</sup>See, e.g., Goetz & Scott, *Enforcing Promises: An Examination of the Basis of Contract*, 89 YALE L.J. 1261, 1265 (1980), MacNeil, *Essays on the Nature of Contract*, 10 N.C. CENTRAL L.J. 159-180 (1979), Posner, *Gratuitous Promises in Economics and Law*, 5 J. LEG. STUD. 411, 411 (1977), Hays, *Formal Contracts and Consideration: A Legislative Program*, 41 COLUM. L. REV. 849, 851 (1941).

<sup>45</sup>See, e.g., C. Langdell, *A Summary of the Law of Contracts* 58 (2d. ed. 1880).

<sup>46</sup>On the basis of the enforcement of promises in American law see generally Friedman, *The Basis of Contractual Obligation: An Essay in Speculative Jurisprudence*, 7 LOY. L.A.L. REV. 1 (1974); Wilson, *The Problem of the Enforcement of Promises in Anglo-American Law*, 32 TUL. L. REV. 371 (1958); Buer, *The Philosophy of Contractual Obligation*, 21 MARQ. L. REV. 157 (1937); Willis, *Rationale of the Law of Contracts*, 11 IND. L.J. 227 (1936); Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553 (1933):

<sup>47</sup>See generally Markesinis, *Cause and Consideration: A Study in Parallel*, 37 CAMBRIDGE L.J. 53 (1978); Chloros, *The Doctrine of Consideration and the Reform of the Law of Contract: A Comparative Analysis*, 17 INT'L & COMP. L.Q. 137 (1968); Keyes, *Cause and Consideration in California - A Re-Appraisal*, 47 CALIF. L. REV. 74 (1959); Von Mehren, *Civil Law Analogues to Consideration: An Exercise in Comparative Analysis*, 72 HARV. L. REV. 1009 (1959); Von Mehren, *The French Civil Code and Contract: A Comparative Analysis of Formation and Form*, 15 LA. L. REV. 687 (1955); Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 1 (1951); Hall, *Cause or Consideration*, 23 CAN. B. REV. 832 (1945); Mason, *The Utility of Consideration - A Comparative View*, 41 COLUM. L. REV. 830 (1941); Glaser, *Doctrine of Consideration and the Civil Law Principle of Cause*, 46 DICK. L. REV. 12 (1941); Snellings, *Cause and Consideration in Louisiana*, 8 TUL. L. REV. 178 (1934); Watton, *Cause and Consideration in Contracts*, 41 L. Q. REV. 306 (1925); Lorenzen, *Cause and Consideration in the Law of Contracts*, 28 YALE L. J. 621 (1919); Comment, *The Cause of Obligations in French Law*, 32 TUL. L. REV. 475 (1958).

<sup>48</sup>S. LITVINOFF, OBLIGATIONS § 278, at 492-493 (6 La. Civ. Law Treatise 1969).

primarily to give effect to the autonomy of the will.<sup>49</sup> All that is required is a true expression of an intent to be bound. (Of course, the concept is not so broad as to validate promises which are made contrary to mandatory rules, public policy or good morals.<sup>50</sup>)

By way of comparison, cause constitutes an integral part of the will, whereas consideration is an integral part of the bargain.<sup>51</sup> Three important legal consequences follow. First, the question whether there is an enforceable contract at civil law depends more exclusively on whether there is a lawful agreement between the parties. At common law, answering the same question requires further inquiry into whether the promise is based on a bargain. Bargain at common law is a part of the definition of the contract,<sup>52</sup> while cause is merely a prerequisite for its validity. As one commentator has stated, "In the civil law, agreement without more equals contract, as long as the agreement is a lawful one. In Anglo-American common law, agreement plus consideration equals contract."<sup>53</sup> The contract-consent approach taken by the civil law clashes with the contract-bargain approach of common law. Indeed, these different approaches permeate the two systems of law.<sup>54</sup>

Second, since consideration refers to the economic concept of bargain, it is based on an objective element. Thus, the subjective characteristics of the contract are normally not a focal point of the judicial inquiry at common law.<sup>55</sup> In fact, the doctrine of "intention to create

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<sup>49</sup>*Id.* at 493.

<sup>50</sup>See LA. CIV. CODE art. 1968: "The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy." See also Italian Civ. Code art. 1343 (1942) ("The cause is unlawful when it is contrary to mandatory rules, public policy, or morals.").

<sup>51</sup>See LITVINOFF, *supra* note 48 at 494.

<sup>52</sup>Contract was early defined as "a bargain or covenant between two parties where one thing is given for another, which is called *quid pro quo*." *Termes De La Ley*, a text published in 1527, cited in Jackson, *The Scope of the Term "Contract,"* 53 L.Q. REV. 525, 526-27 (1937).

<sup>53</sup>Smith, *A Refresher Course in Cause*, 12 LA. L. REV. 1, 4 (1951).

<sup>54</sup>See LITVINOFF, *supra* note 48 at 494.

<sup>55</sup>As Holmes stated, "The Law has nothing to do with the actual state of the parties' minds. In contract, as elsewhere, it must go by externals, and judge parties by their conduct." O. HOLMES, *THE COMMON LAW* 309 (1881). See also Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 464 (1897): "In my opinion no one will understand the true theory of contract or be able even to discuss some fundamental questions intelligently until he has understood that all contracts are formal, that the making of a contract depends not on the agreement of the minds in one intention, but on the agreement of two sets of external signs--not on the parties having *meant* the same thing, but on their having said the same thing." Justice Holmes expressed the same view in *O'Donnell v. Town of Clinton*, where he said, "Assent, in the sense of the

legal relationships" was late in finding its way into common law and does not suffice to give a binding effect to a promise in the absence of consideration.<sup>56</sup> By contrast, cause is an eminently subjective element

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law, is a matter of overt acts, not of inward unanimity in motives, design, or the interpretation of words." 145 Mass. 461, 14 N.E. 747, 751 (1888).

This statement was carried to the extreme in the famous case of *Hotchkiss v. National City Bank of New York*, where the Court said that "[a] contract has, strictly speaking, nothing to do with the personal, or individual, intent of the parties. A contract is an obligation attached by the mere force of law to certain acts of the parties, usually words, which ordinarily accompany and represent a known intent." 200 F. 287, 293 (S.D.N.Y. 1911).

<sup>56</sup>The doctrine of "intent to create a legal relationship" as a requirement in contract formation was unknown in English law until Pollock borrowed it from Savigny. Williston, *Consideration in Bilateral Contracts*, 27 HARV. L. REV. 503, 506 n.13 (1914). Williston argues that consideration by itself is an adequate test of enforcement. He wrote in 1914:

The statement ... that an intent to form a legal relation is a requisite for the formation of contracts, cannot be accepted. It may be good Roman law but, if so, it shows the danger of assuming that a sound principle in Roman law may be successfully transplanted. Nowhere is there greater danger in attempting such a transfer than in the law governing the formation of contracts. In a system of law which make no requirement of consideration, it may well be desirable to limit enforceable promises to those where a legal bond was contemplated, but in a system of law which does not enforce promises unless a price has been asked and paid for them, there is no necessity for such a limitation and I do not believe it exists. The only proof that it does will be the production of cases holding that though consideration was asked and given for a promise it is, nevertheless, not enforceable because a legal relationship was not contemplated. If, however, the parties in effect agree that they will not be bound, this like any other manifested intention will be respected.

*Id.* at 506, 507.

Five years later, English Courts denied judicial recognition of the doctrine. In the landmark case of *Balfour v. Balfour*, [1919] 2 K.B. 571, a wife sued her husband seeking enforcement of an alleged promise made by the husband to provide a certain sum per month for support in return for no demand of any further maintenance. The Court held that there was no consideration and thus no contract between the spouses, and that no intent to create a legal relationship was shown by them. *Balfour* was distinguished by *Parker v. Clark*, [1960] 1 W.L.R. 286 in which a married couple agreed to sell their home and to reside with the wife's elderly aunt and her husband. The parties agreed that the cost of maintaining the larger house would be shared, and that the house would be willed to the niece. After moving in, disagreement arose and the younger couple was asked to leave. They sued for breach of contract, and they were granted relief. The Court recognized that

"[a] proposal between relatives to share a house, and a promise to make a bequest of it, may very well amount to no more than a family arrangement of the type considered in *Balfour v. Balfour*, which the Court will not enforce. But there is equally no doubt that arrangements of this sort, and in particular a proposal to leave property in will, can be the subject of a binding contract .... The question must, of course, depend on the intention of the parties, to be inferred from the language which they use and from the circumstances in which they use it. *Id.* at 292, 293.

The Court found such intention inferred from the wording of the arrangement and from the action-in-reliance by the couple in selling their own house and moving.

whose function by its very nature requires an inquiry into the subjective intentions of the parties.

Third, because consideration is a part of the definition of a contract and is defined as a bargain, it applies only to contracts, and only to those contracts which contemplate a bargain. Gratuitous promises, therefore, fall outside the scope of the contract enforcement or bargain enforcement.<sup>57</sup> Cause, on the other hand, applies not only to contracts, but to all kinds of obligations which arise from declarations of the will.<sup>58</sup> It applies whether the contract is gratuitous<sup>59</sup> or onerous.<sup>60</sup> At civil law, the cause of a bilateral or synallagmatic contract<sup>61</sup> is the engagement undertaken by each party. The cause of the obligation of one party is the obligation assumed by the other. Such exchange of engagements suffices to give rise to a valid contract, regardless of whether it constitutes a benefit to one party or a detriment to the other. In this

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<sup>57</sup>The case for the non-enforceability of gratuitous promises is made by denying that such enforcement would advance any of the objectives of contract law. Fuller enumerated three substantive bases of contractual liability: reliance, unjust enrichment, and private autonomy. In his view, in cases of gratuitous promises, where there is neither reliance nor unjust enrichment, the law should not be called upon to provide protection for a promisee, and in such a case, there is also no "especially pressing case for the application of the principle of private autonomy." Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799, 814 (1941). Similar criteria were suggested by Eisenberg, who devised two tests upon which the enforceability of a gratuitous promise should depend: (1) a substantive test which focuses on "the intensity of the injury resulting from breach, the presence of independent social policies favoring enforcement, and the extent to which failure to provide a remedy will result in unjust enrichment," and (2) an administrative test which "turns on whether the conditions for enforcement can be reliably, readily, and suitably determined in the relevant forum." See Eisenberg, *Donative Promises*, 47 U. CHI. L. REV. 1, 32 (1979). Applying these two tests to donative promises, Eisenberg argued that "unrelied upon informal donative promises should not be enforceable. Unrelied upon formal donative promises present a borderline case for enforceability. Relied upon donative promises should be enforced to the extent of reliance." *Id.*

<sup>58</sup>LA. CIV. CODE art. 1757.

<sup>59</sup>Under LA. CIV. CODE art 1910 "A contract is gratuitous when one party obligates himself towards another for the benefit of the latter, without obtaining any advantage in return." Comment (c) to the article explains that the redundancy of expression "is intended to avoid any possibility of confusion between a gratuitous contract, which is enforceable, and an onerous contract that is unenforceable on grounds of failure of cause, or an onerous contract which, through the miscalculation of one of the parties, proves advantageous to the other party alone."

<sup>60</sup>According to LA. CIV. CODE art. 1909, "A contract is onerous when each of the parties obtains an advantage in exchange for his obligation."

<sup>61</sup>A bilateral or synallagmatic contract exists "when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other." LA CIV. CODE art 1908.

sense, cause again differs from consideration.<sup>62</sup> As to gratuitous contracts, the motive or purpose for which the gift is made constitutes cause. The mere liberality of the donor suffices even though it is not supported by any economic counterpart or bargain.<sup>63</sup>

### (B) The Civilian Approach to Gratuitous Contracts: Its Possible Application at Common Law

The judicial approach to gratuitous promises is different in each system. The issue raised at common law is whether the donor has received a return for his promise of gift; at civil law an initial inquiry is made into whether the contract is classified as gratuitous or onerous. Bound by the bargain theory of consideration, common-law courts have had to squeeze gratuitous promises into bargains in order to enforce them. In practice, such rationalization has confused the characteristics of a gift with those of a bargain in cases like charitable subscriptions, promises of gifts of land, and gratuitous bailments and services.

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<sup>62</sup>A noted statement presenting the classical definition of consideration appeared in *Currie v. Misa*, in which it was said that "[a] valuable consideration in the sense of the law consists either in some right, interest, profit, or benefit accruing to one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." L.R. 10 Ex. 153, 162 (1875). The "benefit-detriment" formula of consideration has been attacked as being "neither sufficient nor necessary to constitute consideration." P. ATIYAH, *CONSIDERATION IN CONTRACTS: A FUNDAMENTAL RESTATEMENT* 15 (1971). Atiyah gives the example of a promise for a nominal consideration where there is no actual benefit to the promisor, nor a detriment to the promisee. He further supports his view with cases like *Hamer v. Sidway*, 27 N.E. 256 (1891), where a promise was made by an uncle to his nephew for the sum of \$5,000, if the nephew would refrain from smoking and other vices for a certain period of time. The promise was held enforceable. Atiyah argues that the nephew did not incur any detriment. *Id.* at 17. It may be argued, however, that there was detriment in restricting the nephew's freedom of action. See Treitel, *Consideration: A Critical Analysis of Professor Atiyah's Fundamental Restatement*, 50 AUST. L.J. 439, 442 (1976). For criticism of the "benefit-detriment" formula, see also Corbin, *Nonbinding Promises As Consideration*, 26 COLUM. L. REV. 550, 554 (1926). Nonetheless the definition of consideration in terms of "benefit-detriment" still prevails. For instance, according to the CALIFORNIA CIVIL CODE § 1605:

Any benefit conferred, or agreed to be conferred upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise.

<sup>63</sup>For a discussion of the concept of cause in gratuitous contracts, see generally, 1 M. POTHIER, *TREATISE ON THE LAW OF OBLIGATIONS* 19 (W. Evans trans. 1839), 4 C. AUBRY & C. RAU, *COURS DE DROIT CIVIL FRANCAIS* § 345 (LOUISIANA STATE LAW INSTITUTE trans. 1969). For criticism of the notion of cause in synallagmatic contracts, real contracts, and donations, see 2 M. PLANIOL & G. RIPERT, *TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL* no. 1038 (LOUISIANA STATE LAW INSTITUTE trans. 1959).

Traditionally, American courts have enforced charitable subscriptions under the bargain theory by categorizing the bargain as: 1) a bilateral contract when the charity's return promise is to use the gift for the purpose designated;<sup>64</sup> 2) a unilateral contract when the charity's subsequent performance is on the faith of the promise;<sup>65</sup> and 3) a multilateral contract when there are a reciprocal undertakings by other subscribers. In gifts of land, courts have found a bargain when the donee takes possession of the land and makes improvements thereon with the encouragement and acquiescence of the donor<sup>66</sup> In gratuitous bailments and agency, courts have found that the trust reposed in the bailee by the bailor furnished the required consideration.<sup>67</sup>

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<sup>64</sup>*See, e.g.,* N.J. Orthopaedic Hosp. & Dispensary v. Wright, 95 N.J.Law 462, 113 A. 144 (1921) (promise to contribute to charitable hospital building fund with stipulation that the subscription was to be applied to the building of an operating room to be named by promisor); Central Me. Gen. Hosp. v. Carter, 125 Me. 191, 132 A. 417, 420 (1926) ("[A] promise, whether express or implied, on the part of the promisee, in case of a proposed gift for a special purpose, to devote the gift when received to the purpose named, or receive it upon the conditions stated, is a sufficient consideration to support the promise to give ....")

<sup>65</sup>*See, e.g.,* In Ex Parte Walker's Ex'r, 253 Ky. 111, 68 S.W.2d 745, 747 (1933) (deceased's pledge of \$25,000 to church in consideration of trustee's agreeing to erect new building held binding on his estate); Commissioner of Internal Rev. v. Bryn Mawr Trust Co., 87 F.2d 607, 609 (3rd Cir. 1936) ("Trustees of ... College expended all the money subscribed and paid by the decedent ... for the purposes which decedent intended to promote. There was, therefore, consideration, which was adequate under the law ...."); Keuka College v. Ray, 167 N.Y. 96, 60 N.E. 325, 326 (1901) ("[I]f money is promised to be paid upon the condition that the promisee will do some act or perform certain services, then the latter, upon performance of the condition, may compel payment.").

<sup>66</sup>*See, e.g.,* Clancy v. Flusky, 187 Ill. 605 (1900) (a promise of a father to give his farm to his sons if they would move onto it, cultivate and improve it, and furnish him a home with them, will be enforced when they have done their part of the agreement); Messiah Home for Children v. Rogers, 212 N.Y. 315, 106 N.E. 59, 60 (1914), ("[w]here there has been a gift of real estate and the donee in reliance thereon and with knowledge of the donor has entered on the premises and made expenditures of a certain character, performance of the gift will be enforced, and, if necessary, a conveyance of the lands adjudged.").

A great number of Courts have suggested that although taking actual possession of the land and making improvements thereon by the donee on the faith of the gratuitous promise do not constitute consideration at law, the same acts provide consideration for the promise in equity. *See, e.g.,* Bright v. Bright, 41 Ill. 97, 100-101 (1866) ("A parol promise of this character would, undoubtedly, be enforced in a court of equity, if the promisee, relying upon it, has entered and expended money. It would substantially, in such event, be a promise resting upon a valuable consideration"); Lobdell v. Lobdell, 36 N.Y. 327, 331 (1867) ("[I]f the promisor on the faith of the promise, does some act or enters into some engagement which the promise justified, ... this equity might regard as confirming and establishing the promise in much the same way as a consideration for it would.").

<sup>67</sup>In the leading case of a gratuitous bailment, *Coggs v. Barnard*, 2 Ld. Raym. 909, 92 Eng. Rep. 107 (1703) plaintiff delivered a cask of brandy to defendant, a car-

In reality, however, a gratuitous promisor does not seek an exchange for his promise. The fact of the matter is that in dealing with a gratuitous promise, whether it concerns a gift to a charity, a gift of land, or a gratuitous bailment or agency, judicial enforcement of the particular promise on the basis of bargain is merely a fiction invented by courts because good judgment or social policy makes it imperative or desirable to award a judgment in favor of the plaintiff.

However, "fictions of law should deceive no one. They should be avoided where a more logical theory will support the rule of liability."<sup>68</sup> The civil law dispenses with the requirements of bargain in gratuitous contracts, usually requiring instead some kind of formality as a prerequisite to enforcement. The Louisiana Civil Code, for instance, provides that an executory donation accepted by the donee,<sup>69</sup> whether it is a gift of immovables<sup>70</sup> or movables,<sup>71</sup> is valid only by notarial act. The code

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rier, who took the responsibility of transporting the brandy to a third party without any compensation. As a result of the carrier's negligence, the freight was damaged. The issue arose as to whether the defendant was liable, although he did not receive any consideration in return for his service. The Court held him liable on the basis that plaintiff had trusted him, and "a bare being trusted with another man's goods must be taken to be a sufficient consideration if the bailee once enter upon the trust, and take the goods in to his possession." *Id.* at 114. The reason for the action, the Court said, was "that the owner's trusting [the carrier] with the goods is a sufficient consideration to oblige [the carrier] to a careful management. *Id.* at 113. Similarly, in *Siegel v. Spear & Co.*, 234 N.Y. 479, 138 N.E. 414 (1923) another famous case which dealt with gratuitous bailment and agency, plaintiff bought some furniture from defendant and asked him to store it for him until he returned from a vacation. Defendant agreed to do so without charging plaintiff. Plaintiff furthermore wanted to insure the furniture himself but defendant told him "that won't be necessary ... ." *Id.* at 415. Plaintiff, relying upon this promise, did not purchase insurance. Defendant failed to honor his promise. The furniture was destroyed by fire. Defendant argued that his promise was not binding for lack of consideration and that his undertaking was voluntary and gratuitous.

The Court, however, found the defendant liable on the basis that "the promise [to insure] ... was linked up with the gratuitous bailment .... It was after his statements and promises that the plaintiff sent the furniture to the storehouse .... The defendant ... entered upon execution of the trust." *Id.* The Court concluded that "[A]n action on the case lay for a misfeasance in a breach of trust undertaken voluntarily ... [and that] from this aspect of the case ... there was a consideration for the agreement to insure." *Id.*

<sup>68</sup>Arterburn, *Liability For Breach Of Gratuitous Promises*, 22 ILL. L. REV. 161, 169 (1927).

<sup>69</sup>LA. CIV. CODE art. 1540 provides that "A donation *inter vivos* shall be binding on the donor, and shall produce effect only from the day of its being accepted in precise terms." The article further states that "The acceptance may be made during the lifetime of the donor by a posterior and authentic act, but in that case the donation shall have effect, with regard to the donor, only from the day of his being notified of the act establishing that acceptance."

<sup>70</sup>Under LA. CIV. CODE art. 1536, "An act shall be passed before a notary public and two witnesses of every donation *inter vivos* of immovable property or in-

also allows revocation of the gift in cases of ingratitude or improvidence.<sup>72</sup>

It seems, therefore, that the common law approach to gratuitous promises suffers practical difficulties in application, while the civil law, by adopting a broad definition of cause, does not face the same pitfalls. It may also be argued that the civil law follows a more balanced approach. It allows full enforcement of such contracts, while at the same time leaving the door open to the possibility of revocation in specified circumstances, as justice and common sense require.

Is such a solution possible in a common law system? Perhaps not. The revocability of gratuitous promises does not altogether fit the common law system.<sup>73</sup> Common law, as indicated,<sup>74</sup> is reluctant to inquire into subjective characteristics or personal intentions. Allowing a donor to revoke his donation in cases of ingratitude or improvidence would necessarily require such inquiries.<sup>75</sup> "Perhaps the civil law style of adjudication is suited to wrestling with these kinds of inquiries, but they have held little appeal for common law courts, which traditionally have been oriented towards inquiry into acts rather than into personal charac-

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corporeal things, such as rents, credits, rights, or actions, under the penalty of nullity."

<sup>71</sup>LA. CIV. CODE art. 1538 (donation of movable effects invalid "unless an act is passed of the same, as is before prescribed."). The article further states that "such an act ought to contain a detailed estimate of the effects given."

<sup>72</sup>LA. CIV. CODE art. 1559:

Donations *inter vivos* are liable to be revoked or dissolved on account of the following cases:

- (1) The ingratitude of the donee;
- (2) The non-fulfillment of the eventual conditions, which suspend their consummation;
- (3) The non-performance of the conditions imposed on the donee;
- (4) The legal or conventional return.

LA. CIV. CODE art. 1560:

Revocation on account of ingratitude can take place only in the three following cases:

- (1) If the donee has attempted to take the life of the donor;
- (2) If he has been guilty towards him of cruel treatment, crimes or grievous injuries;
- (3) If he has refused him food, when in distress.

LA. CIV. Code art. 1497:

The donation *inter vivos* shall in no case divert the donor of all his properties; he must reserve to himself enough for subsistence; if he does not do it, a donation ... is null for the whole ....

<sup>73</sup>See Eisenberg, *supra* note 57, at 15-18.

<sup>74</sup>See *supra* note 55 and accompanying text.

<sup>75</sup>See Eisenberg, *supra* note 57, at 15.



teristics."<sup>76</sup> Moreover, any such possible solution would be less acceptable at common law which, as we have seen,<sup>77</sup> refuses to enforce promises except in order to advance an economic interest.

More importantly, common law problems of enforcement have their counterparts at civil law as a result of the formality requirement. At civil law, although a lawful cause may support a gratuitous contract, the contract is generally unenforceable in the absence of form. To enforce gratuitous contracts wanting for form where unenforceability seems unjust, civilians have had to rely upon various exceptions to avoid the requirement. The Louisiana Civil Code, for instance, gives binding effect to a formal confirmation by the donor as a substitute for making a gift in notarial form.<sup>78</sup> The code also requires no form in cases of manual gifts.<sup>79</sup> Courts in civil law countries frequently apply the concept of a "disguised gift," whereby a donation will be interpreted as an onerous contract, and therefore will be enforceable without special form.<sup>80</sup>

In civil law, therefore, the gift may be clad in the panoply of an onerous contract, while in common law, gifts may be squeezed into the mold of bargains. Both systems of law resort to the same unrealistic rationalizations in an attempt to give binding effect to a gift promise.

### (C) Charitable Subscriptions: The French, German, and Louisiana Experience

A few illustrations from three civil law jurisdictions will demonstrate the strained reasoning of civil law courts in their attempt to enforce informal gratuitous promises in charitable subscription cases. An example of a charitable subscription that came before the French Court of Cassation involved a promise made following the First World War to pay 100,000 francs to the city of Nancy for the purpose of establishing a fund to support the families of combatants. The city did establish such

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<sup>76</sup>*Id.* at 16.

<sup>77</sup>See *supra* note 57.

<sup>78</sup>"A donation *inter vivos* that is null for lack of proper form may be confirmed by the donor, but the confirmation must be made in the form required for a donation." LA. CIV. CODE art. 1845.

<sup>79</sup>"The manual gift, that is, the giving of corporeal movable effects, accompanied by a real delivery, is not subject to any formality." LA. CIV. CODE art. 1539. Article 1541 further states that "[I]f the donation has been executed, that is, if the donee has been put by the donor into corporeal possession of the effects given, the donation, though not accepted in express terms, has full effect."

<sup>80</sup>For discussion of the concept of disguised gifts in French law, see Dawson, *supra* note 2, at 74-83.

a fund, but the promisor refused to honor his promise. The Court of Appeal of Nancy decided that the subscription amounted not only to an *engagement d'honneur*, but to a legal duty, and that as such it was not governed by the rules applicable to gratuitous contracts, including that which requires form. It was a *contrat innomé*, admittedly gratuitous *vis-à-vis* the families who were to benefit, but a *contrat commutatif vis-à-vis* the organizers of the fund.<sup>81</sup>

Similar reasoning was followed in an earlier French case in which a promise was made both to a local church and an iron founder who agreed to install three new bells at the request of the church. The promisor agreed to pay the cost of one bell if the belfry was constructed like an old bell tower he remembered from his youth. The iron founder complied with the specifications as set forth in the promise, but when the promisor died, his widow refused to pay on the ground that her husband's promise was a mere gratuity that was void because it was not notarized. The courts held that since the promisor had derived a benefit from his promise, it was not a gift but a *contrat commutatif*. The Court of Appeal focused on the fact that the cost of the bell was increased by the unusual terms of the promise. The Court of Cassation pointed instead to the "onerous conditions that [the promisor] a man of considerable fortune," had imposed "for the sole purpose of satisfying his caprice, his fantasy or his vanity."<sup>82</sup>

Under the German Civil Code, "for the validity of a contract whereby an act of performance is promised gratuitously, notarial authentication of the promise is necessary."<sup>83</sup> In the interest of avoiding injustice, German judges also have had to resort to strained reasoning to enforce an informal gratuitous promise. In one interesting case, a written promise to pay 500,000 marks was made to a cremation society. The funds were to be used towards the building of a crematorium at an esti-

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<sup>81</sup>17 March 1920, D.P.19202.65. The Cour de Cassation upheld this decision. (Civ. 5 Feb. 1923, D.P. 1923, 1.20 cited in 2 K. ZWEIGERT & H. KOTZ, AN INTRODUCTION TO COMPARATIVE LAW, Vol. II, 67 (Weir Trans. 1977).

<sup>82</sup>D.P.18631.402 (1863) cited in Dawson, *supra* note 2, at 87-88. "Contrat commutatif" refers to a contract "when each one of the parties engages to give or to do a thing which is regarded as the equivalent to what is given to or done for him." French Civ. Code art. 1104 (Crabb trans. 1977.). The requirement of notarial form of *inter vivos* gifts is contained in article 931 which provides that "[a]ll instruments importing an *inter vivos* gift are executed before notaries, in the ordinary form of contracts; and record will be kept thereof, on pain of nullity."

<sup>83</sup>German Civ. Code art. 518 (Forrester, Goren & Ilgen trans. 1975).

mated cost of 500,000 marks. The society started construction, but after two payments of 100,000 marks each, the donor refused to make further payments. Upon his death, the society sought the enforcement of the promise against his heirs. The lower court concluded that the promise was enforceable, holding that it was not a gift and did not require notarization. The court reasoned that to constitute a gift the donee must be enriched by the donation, and the enrichment must be final and substantial.<sup>84</sup> The Court borrowed the common-law concept of "trust" or "fiduciary property" to reach the conclusion that the society was merely a trustee, which acquired the money to build the crematorium on public land. The society had not been enriched in any way by the transfer of money. The higher court upheld the decision that there was a valid contract of debt:

These reasons contain no error of law. In denying that the contract between [the deceased] and the plaintiff was a promise of gift the court below asked to what type of contract it belonged; the answer is that the traditional division of transfers of property into those which are obligandi credendi or donandi causa is not exhaustive but simply indicates the commonest and most important purposes for which transfers are made. A causal, as opposed to an abstract transaction which is not donative may perfectly well impose no duty to make any counterperformance or restitution; the aim may be different, as it is in the case where the recipient is to undertake an act for charitable, communal or altruistic purposes.<sup>85</sup>

The difficulty of enforcing an informal gratuitous promise has also been manifest in the Louisiana jurisprudence. In the case of *Louisiana College v. Keller*,<sup>86</sup> the defendant orally promised to pay \$500 towards establishing a college. The college was established, but defendant re-

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<sup>84</sup>62 R.G.Z. 386 (1905) cited in Dawson, *supra* note 2, at 70. The court relied on article 527 of the German Civil Code, which provides that:

- (1) If the execution of the burden remains unperformed the donor may, under the conditions specified for the right of rescission in the case of mutual contracts, demand the return of the gift under the provisions relating to the return of unjust enrichment to the extent that the gift ought to have been applied to the execution of the burden.
- (2) This claim is barred if a third party is entitled to require the execution of the burden.

<sup>85</sup>*Id.*

<sup>86</sup>10 La. 164 (1836).

fused to honor his promise. In holding his promise binding, the Louisiana Supreme Court stated that "[a]n obligation according to the code is not the less binding though its consideration or cause is not expressed. We are not informed as to the consideration of this promise by anything on the face of papers."<sup>87</sup> The court then invoked both theories, consideration and cause, and said "[i]t may have been the advantage the defendant expected to derive from the establishment of a college at his own door, by which he would save great expense in the education of his children or it may have been a spirit of liberality and desire to be distinguished."<sup>88</sup> The court concluded, "Whatever it may have been, we see nothing illicit in it; nothing forbidden by law, and the promise binds him, if he consented freely, and the contract had a lawful object. In contracts of beneficence, the intention to confer a benefit is a sufficient consideration."<sup>89</sup>

Again, in *Baptist Hospital v. Cappel*,<sup>90</sup> after the Louisiana Nurses' Board threatened to withdraw accreditation of the Nurses' Training school unless a new nurses' home was built, the hospital engaged in a fund-raising campaign for the construction of such a home. The defendant, a physician, signed a pledge card for the sum of \$500, payable in four installments.<sup>91</sup> The defendant paid the first installment, but refused to pay the remainder on the ground that the hospital had moved the construction site about two miles from the original site and that the home was not built on time. The court refused both claims, finding that "necessity and sound judgment required the building of the new home some place other than the old hospital site",<sup>92</sup> and that "the board decided upon the new location and began the erection of the building spending many thousands of dollars, without any complaint

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<sup>87</sup>*Id.* at 167.

<sup>88</sup>*Id.*

<sup>89</sup>*Id.*

<sup>90</sup>14 La. App. 626, 129 So. 425 (2nd Cir. 1930).

<sup>91</sup>The pledge card provided:

For a valuable consideration, receipt of which is hereby acknowledged, and in consideration of the subscription of others, I hereby subscribe and promise to pay to the order of the Baptist Hospital at Rapides Bank, Alexandria, Rapides Parish, Louisiana. It is understood that this money is for the construction and equipment of a home for nurses and for an addition to the present hospital buildings and equipment of the Baptist Hospital in Alexandria, Louisiana, and that the first call on the money collected shall be for the Home for Nurses.

*Id.* at 627, 129 So. at 426.

<sup>92</sup>*Id.* at 628, 129 So. at 426.

from any subscriber until the money collected had been expended."<sup>93</sup> The court also stated that there was no merit in defendant's contention that the home was not built on time; it pointed out that defendant expected his gift to be used to maintain the school's standing.<sup>94</sup> "He well knew that the building of the home depended upon the subscriptions made and collected, and if sufficient subscriptions had not been made the home could never have been built."<sup>95</sup> Using an analysis mixed with liberality and onerosity, the court concluded that "[i]t was his kind feeling for the young ladies in training and his generosity that caused him to sign the pledge."<sup>96</sup> The court continued: "The purpose for which he claims to have given has been accomplished, the standing of the training school has not been withdrawn, and he should be satisfied unless he can show some injury to himself, which he has failed to show."<sup>97</sup>

#### (D) Onerosity-Liberality or Reliance

In the previous cases of charitable subscriptions, where a fund to support families of combatants was created, a church bell tower constructed, a crematorium built, and a college and a nursing home were established, courts felt that it was only just and equitable to enforce the informal gratuitous promises that induced actions of reliance. Bound by the formality requirements of various civil codes, however, the courts either had to interpret the gratuitous contracts as onerous or to probe deep into the purpose of the gifts to negate their liberality. Nonetheless, promissory estoppel, with detrimental reliance as its basis, could have provided the French, German and Louisiana courts with a theory of liability preferable to those of cause or consideration. The application of promissory estoppel does not depend on elements of onerosity; nor does it require a search into the purpose behind the making of the gift; it gives effect to actions-in-reliance upon the promise, shifting the judicial focus to the question whether this reliance was foreseeable, reasonable and detrimental.

Promissory estoppel has been applied in the United States as a substitute for consideration in cases of charitable subscriptions. Under the estoppel theory, mere action by the charitable institution in reliance

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<sup>93</sup>*Id.* at 629, 129 So. at 427.

<sup>94</sup>*Id.*

<sup>95</sup>*Id.*

<sup>96</sup>*Id.*

<sup>97</sup>*Id.*

on the gratuitous promise is sufficient to establish liability on the part of the donor and to estop him from revoking his promise, or from pleading want of consideration or invalidity of his donation.<sup>98</sup>

Unlike the theory of cause, promissory estoppel requires no inquiry into the subjective intentions of the donor, an inquiry which, as previously noted,<sup>99</sup> is less acceptable at common law than at civil law. Nor does it upset the fundamental basis upon which the rules of gratuitous promises rest at common law.<sup>100</sup> Under the estoppel theory, not every gratuitous promise is enforceable, and legal intervention is only justified when there is a need to protect reliance on the gratuitous promise. Professors Zweigert and Kotz of Germany argue that such a theory is viable in a civil-law system. They state:

Not all cases can be solved by concentrating on the purpose behind the gift. The excellent idea of promissory estoppel in the American cases may be useful in enforcing informal gratuitous promises where the promisee, as the promisor might well have foreseen, has altered his position to his detriment in justifiable reliance. This is a good idea well worth adopting, and the German courts could adopt it without waiting for legislation. When an enactment is as old as the German BGB it should be extended beyond its literal meaning by bold and progressive interpretation in the light of comparative law.<sup>101</sup>

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<sup>98</sup>See, e.g., *Gans v. Reimensyder*, Adm'r, 110 Pa. 17, 2 A. 425, 428 (1885) ("a subscription to a charity embodies in it no previous consideration; hence ... it can be operative only by way of estoppel, and unless ... some undertaking has been commenced or continued on the faith of it, it cannot be regarded as a binding contract."); *Simpson Centenary College v. Tuttle*, 71 Iowa 596, 33 N.W. 74, 76 (1887) ("This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor should be estopped from pleading want of consideration."); *Miller v. Western College of Toledo*, 177 Ill. 280, 52 N.E. 432, 436 (1898) ("If money has been expended, or liabilities have been incurred ... [and] if the note is not paid, the donor ... is, in good conscience, bound to pay; and the gift will be upheld upon the ground of estoppel, and not by reason of any valid consideration in the original undertaking."). See also *Sterling v. Victor Cushwa & Sons*, 170 Md. 226, 183 A. 593, 597 (1936); *In Re Lord's Will*, 175 Misc. 921, 25 N.Y.S.2d 747, 752 (Sur. Ct. 1941); *In Re Stack's Estate*, 164 Minn. 57, 204 N.W. 546, 547 (1925); *In Re Drain's Estate*, 311 Ill. App. 481, 36 N.E.2d 608, 610 (1941).

<sup>99</sup>See supra note 55 and accompanying text.

<sup>100</sup>See supra note 57 and accompanying text.

<sup>101</sup>ZWEIGERT & KOTZ, supra note 82, at 71.

### (E) Rejection of Promissory Estoppel as a Substitute for Consideration in English Law

Such operation of promissory estoppel is unacceptable in English law. Except for the limited application of proprietary estoppel in cases involving conveyances of land,<sup>102</sup> English law generally adheres to the common-law rule that an informal gratuitous promise is unenforceable in the absence of consideration. The famous case of *In re Hudson*<sup>103</sup> illustrates the English position. In this case, counsel for the charity argued for the enforceability of a charitable subscription. He recognized that "[t]he undertaking by the testator in this case was a representation which was equivalent to a promise and if nothing more had happened it

<sup>102</sup>See e.g., *Dillwyn v. Llewellyn*, [1862] 45 Eng. Rep. 1285, 1286:

[T]he subsequent acts of the donor may give the donee that right or ground of claim which he did not acquire from the original gift ... So, if A puts B in possession of a piece of land and tells him "I give it to you that you may build a house to it," and B, on the strength of that promise, with the knowledge of A, expends a large sum of money, in building a house ... the donee acquires a right from the subsequent transaction to call on the donor to perform that contract and complete the imperfect donation which was made.

English authorities have expressed the view that proprietary estoppel, or estoppel by encouragement or acquiescence, is a different concept from promissory estoppel. They argue that unlike promissory estoppel, which is merely a defensive plea, proprietary estoppel supports a cause of action, and that proprietary estoppel was not known in England until Denning's famous decision in the *High Trees* case in 1947. The argument has also been made that full enforcement of the promise distinguishes the two concepts. While proprietary estoppel merely operates to restore the status quo of the parties (by not giving the donee any right to acquire a title in land), promissory estoppel goes a step further, allowing the donee the right to specific performance. See Bower & Turner, *supra* note 1; Stoljar, *A Rationale of Gifts and Favours*, 19 MOD. L. REV. 237, 247 (1956). See also G. H. TREITEL, AN OUTLINE OF THE LAW OF CONTRACT, 48 (3d ed. 1984).

With all due respect, these assertions are inaccurate. The English concept of detrimental reliance is much older than the High Trees doctrine, and the notion that estoppel is always a shield and never a sword has recently been challenged in England. See e.g., Jackson, *Estoppel as a Sword*, 81 L.Q. REV. 84 & 223 (1965); Atiyah, *Misrepresentation, Warranty and Estoppel*, 9 ALBERTA L. REV. 347, 369-373 (1971); Sheridan, *Equitable Estoppel Today*, 15 MOD. L. REV. 325, 328-331 (1952); Thompson, *From Representation to Expectation: Estoppel as a Cause of Action*, 42 CAMBRIDGE L.J. 257, 266-269 (1983); Simpson, *Promises Without Consideration and Third Party Beneficiary Contracts in America and English Law*, 15 INT. & COMP. L.Q. 835, 839-840 (1966); Hickling, *Labouring with Promissory Estoppel: A Well-Worked Doctrine Working Well?*, 17 U.B.C. L. REV. 183, 186-190 (1983).

Nor does the measure of damages distinguish proprietary estoppel from promissory estoppel. In *Dillwyn v. Llewellyn*, the case quoted from above, the Court gave the donee not only a life estate but a fee simple absolute on the basis of proprietary estoppel. The right of specific performance has been awarded in cases of proprietary estoppel and promissory estoppel without distinction. In reality both concepts are one and the same, designed to protect a promisee who relied to his detriment on a gratuitous promise.

<sup>103</sup> 54 L.J. R. 811 (1885).

might have remained a nudum pactum."<sup>104</sup> However, it was argued that the subscription was enforceable on the basis of detrimental reliance, for the promise had "influenced the conduct of several persons - the Jubilee fund was founded, the committee was formed, and engagements were entered into by them with the testator's knowledge that that was done in consequence of his promise. That made the promise binding."<sup>105</sup> The Court, however, failing to find consideration for the promise, held it unenforceable. Justice Pearson said

The ... question is whether or not there is any contract at all to pay — I mean a contract in the legal sense of word 'contract,' was there any consideration of any sort or description for Mr. Hudson's promise to pay Lounsel £20,000 — anything that could be considered a consideration either in this court or elsewhere? I am utterly at a loss to ascertain that there was any consideration.<sup>106</sup>

The *Hudson* case exemplifies the restrictive English approach to promissory estoppel. In England, promissory estoppel is not accepted as a substitute for consideration in contract formation. In *Central London Property Trust, Ltd. v. High Trees House, Ltd.*,<sup>107</sup> Judge Denning distinguished between the formation of a contract and its modification or discharge; while consideration is required for the former, a promise to modify or discharge the contract does not require consideration to be binding. Judge Denning stated that "[t]he time has come for the validity of such a promise to be recognized. The logical consequence, no doubt,

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<sup>104</sup>*Id.* at 814.

<sup>105</sup>*Id.*

<sup>106</sup>*Id.*

<sup>107</sup>[1947] 1 K.B. 130. In this case, a lessee rented a block of flats in 1937 at a rent of 2,500 pounds a year. In 1940, the lessors agreed to reduce the rent to 1,250 pounds because of the wartime conditions. The agreement was in writing. The lessee paid the reduced rent until 1945 when the lessors brought an action demanding that the rent be paid at the original rate, and claiming the previous arrears.

The case came before Judge Denning, who held that the landlord who agreed to waive payment of the full amount of the rent originally agreed upon could not later claim otherwise. He laid down the principle which became the basis of the recent application of promissory estoppel in England, that "a promise intended to be binding, intended to be acted on and in fact acted on, is binding ...." *Id.* at 135.

For discussion of the case and its implications in the English law of contracts, see Notes, 63 L.Q. REV. 283 (1947); 63 L.Q. REV. 19 (1947); 97 L.J. 355 (1947); 25 CAN. B. REV. 508 (1947); 204 L.T. 91 (1947); 64 L.Q. REV. 29 (1948); 93 SOL. J. 414 (1949); 101 L.J. 466 & 551 (1951); 16 M.L.R. 441 (1953); 29 A.L.J. 468 (1956); 229 L.T. 145 (1960); 34 A.L.J. 18 (1962); 79 L.Q. REV. 238 (1963); 1 N.Z.U. L. REV. 232 (1964); 1 A.C.L.R. 131 (1970); 2 A.C.L.R. 12 (1970).



is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration."<sup>108</sup> Nonetheless, in *Combe v. Combe*,<sup>109</sup> Judge Denning made it clear that consideration is still unaffected by the application of promissory estoppel in the law of contract. He declared that:

Seeing that the principle never stands alone as giving a cause of action in itself, it can never do away with the necessity of consideration when that is an essential part of the cause of action. The doctrine of consideration is too firmly fixed to be overthrown by a side-wind. Its ill effects have been largely mitigated of late, but it still remains a cardinal necessity of the formation of a contract, though not of its modification or discharge.<sup>110</sup>

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<sup>108</sup> Again, Denning made this distinction in his famous article, *Recent Developments in the Doctrine of Consideration*, 15 MOD. L. REV. 1,135 (1952). He stated that:

The law for centuries has been that a promise to waive, modify or discharge the strict terms of a contract needs to be supported by consideration just the same as any other promise. In former times no one saw any distinction between a promise given in formation of a contract and a promise given in discharge of a contract .... Once attention is drawn to it, however, it becomes obvious that the two things are in fact quite different. There is a new factor present in the modification or discharge of a contract which does not occur on the formation of a contract. That new factor is that each party is already bound in law to perform his part of the existing contract, and it is that very factor which has caused all the trouble about consideration .... But strict legal rights are always capable of being modified by the interposition of equity, and that is what has happened in the discharge of contracts ....

*Id.* at 3-4.

<sup>109</sup>[1951] 2 K.B. 215, 1 All E.R. 767. In this case a husband undertook to pay his estranged wife maintenance in the amount of 100 pounds per annum. When he failed to honor his promise, she sued him for the arrears. The husband claimed that his promise was merely gratuitous and thus not binding. The wife asserted that she had refrained from applying to the court to have maintenance fixed, and that such forbearance constituted consideration for the promise. Denning concluded that such forbearance was not agreed to between the parties, and was not requested by the husband. Consequently, although the wife had in fact refrained from applying for maintenance, her inaction did not constitute legal consideration. Denning further held that the wife could not sue on the basis of detrimental reliance.

<sup>110</sup>*Id.* at 220.

### (3) NEGATIVE INTEREST IN NEGOTIATIONS, IMPERFECT AGREEMENTS AND THE CONCEPT OF FAULT

#### (A) Extension of Promissory Estoppel to the Pre-Contractual Bargaining Process: The American and English Positions

Promissory estoppel has been utilized by American courts in the area of contract negotiations. A typical "promissory estoppel-negotiations" case involves a promise or a set of promises made by a defendant in the process of entering into an agreement with a plaintiff. The plaintiff relies on the promise or promises to his detriment by incurring expenses or undertaking legal liability in preparation for the anticipated contract, and the defendant fails to honor his promise. The traditional common-law solution in such a case precludes liability for lack of an enforceable contract. The promise to enter into a contract amounts merely to an "agreement to agree," and has no binding effect.<sup>111</sup> In the leading case of *Hoffman v. Red Owl Stores, Inc.*,<sup>112</sup> however, plaintiff was compensated to the extent of his detrimental reliance, irrespective of the fact that a contract was not reached between the negotiating parties. The facts of the case are best summarized by the Second Restatement of Contracts:

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<sup>111</sup>Ridgway v. Wharton, [1854] 43 E.R. 266. The Court clearly stated the common law rule:

An agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be afterwards settled between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of that agreement are settled. Until those terms are settled he is perfectly at liberty to retire from the bargain.

See also *Rosenfield v. United States Trust Co.*, 290 Mass. 210, 195 N.E. 323, 325 (1935) ("A failure of the parties to agree on material terms may not merely be evidence of the intent of the parties to be bound only in the future, but may prevent any rights or obligations from arising on either side for lack of a completed contract."); *Upsal Street Realty Co. v. Rubin*, 326 Pa. 327, 192 A. 481, 483 (1937) ("It is not unusual for persons to agree to negotiate with the view of entering into contractual relations and to reach an accord at once as to certain major items of the proposed contract and then later find that on other details they cannot agree. In such a case no contract results."). See generally *Beach & Clarridge Co. v. American Steam G & V. Mfg. Co.*, 202 Mass. 177, 88 N.E. 924 (1909); *Ansorge v. Kane*, 244 N.Y. 395, 155 N.E. 683 (1927); *Socony-Vacuum Oil Co. v. Waldo*, 289 Mich. 316, 286 N.W. 630 (1939); *Baum v. Rock*, 106 Colo. 567, 108 P.2d 230. (1940); *Dimitre Electric Co. v. Paget*, 175 Or. 72, 151 P.2d 630. (1944); *P.R.T. INV. Corp. v. Ranft*, 363 Mo. 522, 252 S.W.2d 315, 319 (1952).

<sup>112</sup>26 Wis.2d 683, 133 N.W.2d 267 (1965).

A, who owns and operates a bakery, desires to go into the grocery business. He approaches B, franchisor of supermarkets. B states to A that for \$18,000 B will establish A in a store. B also advises A to move to another town and buy a small grocery to gain experience. A does so. Later B advises A to sell the grocery, which A does, taking a capital loss and foregoing expected profits from the summer tourist trade. B also advises A to sell his bakery to raise capital for the supermarket franchise, saying "everything is ready to go. Get your money together and we are set." A sells the bakery, taking a capital loss on this sale as well. Still later, B tells A that considerably more than an \$18,000 investment will be needed, and the negotiations between the parties collapse. At that point of collapse, many details of the proposed agreement between the parties are unresolved. The assurances from B to A are promises on which B reasonably should have expected A to rely, and A is entitled to his actual losses on the sales of the bakery and grocery and for his moving and temporary living expenses. Since the proposed agreement was never made, however, A is not entitled to lost profits from the sale of the grocery or to his expectation interest in the proposed franchise from B.<sup>113</sup>

In England, extension of the doctrine of promissory estoppel to the pre-contractual bargaining process is unacceptable. Although there are some cases holding negotiating parties to a duty of care that imposed liability on the basis of negligent misrepresentation,<sup>114</sup> such liability

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<sup>113</sup>RESTATEMENT (SECOND) OF CONTRACTS § 90 Comment d, illustration 10 (1981).

<sup>114</sup>For instance, in *Eso Petroleum Co., Ltd. v. Mardon*, [1976] Q.B. 801, plaintiff, a large oil company, found a prospective site for a gas station. On the basis of an experienced employee's calculation of the location's potential, plaintiff bought the site and built the station. It later signed an agreement with a tenant (defendant) who, relying upon the Oil Company employee's calculations, invested all of his capital into the business. The calculations turned out to be far from accurate. When the tenant could no longer pay cash for the gas supplied him, plaintiff-lessor issued a writ claiming possession of the premises, money owed, and mesne profits. In response, defendant sought damages for breach of warranty or, alternatively, for negligent misrepresentation.

As to the latter, defendant claimed that he had been induced to enter into the contract by the company's representations. The Court held for defendant. Lord Denning said:

[I]f a man, who has or professes to have special knowledge or skill, makes a representation by virtue thereof to another — be it advice, information or opinion — with the intention of inducing him to enter into a contract with him, he is under a duty to use reasonable care to see that the representation is correct, and that the advice, information or opinion is reliable. If he negligently gives unsound advice or misleading opinion, and thereby induces the other side to enter into a contract with him, he is liable in damages.

was only established where negotiations have materialized into a contract. There are also cases in which the courts supplied the missing terms of an incomplete agreement.<sup>115</sup> However, English law has not yet recognized a *Hoffman*-type doctrine of liability during negotiations based on detrimental reliance regardless of whether a contract was - or could be - reached between the negotiating parties.

As indicated,<sup>116</sup> promissory estoppel in England operates to give effect to modification or discharge of a contractual right. This limitation was established at an early date in the *Hughes* case,<sup>117</sup> in which it was stated that estoppel applies to parties who already "have entered into definite and distinct legal terms."<sup>118</sup> Following *Hughes*, English courts have restricted application of promissory estoppel to cases involving a pre-existing contractual<sup>119</sup> or, at least, legal relationship.<sup>120</sup>

*Id.* at 820.

<sup>115</sup>*See, e.g.,* *Hillas & Co., Ltd. v. Arcos, Ltd.*, [1932] All E.R. 494, 503-504, where Lord Wright wrote:

[I]t is clear that the parties both intended to make a contract and thought they had done so. Business men often record the most important agreements in crude and summary fashion; modes of expression sufficient and clear to them in the course of their business may appear to those unfamiliar with the business far from complete or precise. It is, accordingly, the duty of the court to construe such documents fairly and broadly, without being too astute or subtle in finding defects; but, on the contrary, the Court should seek to apply the old maxim of English law, *verba ita sunt intelligenda ut res magis valeat quam pereat*. That maxim, however, does not mean that the Court is to make a contract for the parties, or to go outside the words they have used, except in so far as there are appropriate implications of law, as, for instance, the implication of what is just and reasonable to be ascertained by the court as a matter of machinery where the contractual intention is clear but the contract is silent on some detail.

<sup>116</sup>*See supra* notes 108-111 and accompanying texts.

<sup>117</sup>*See supra* notes 25-27 and accompanying text.

<sup>118</sup>*Id.* at 448.

<sup>119</sup>*See, e.g.,* *Emmanuel Ayodeji Ajayi v. Briscoe*, [1964] 3 All E.R. 556, 559 ("The principle, which has been described as quasi estoppel and perhaps more aptly as promissory estoppel, is that when one party to a contract, in the absence of fresh consideration agrees not to enforce his rights an equity will be raised in favor of the other party"); *Salisbury (Marquess) v. Gilmore*, [1942] 2 K.B. 38, ("that principle is that [if] a person with a contractual right against another induces that other to believe that it will not be enforced, he will not be allowed to enforce the right without at any rate putting that other party into the position he was in before."). *Accord* *James v. Heim Galley (London) Ltd.*, 256 Estate Gazette 819, 821 (1980); *Argy Tradin, Development Co., Ltd. v. Lapid Developments Ltd.*, [1977] 1 W.L.R. 444, 456.

<sup>120</sup>*See, e.g.,* *Combe v. Combe*, [1951] All E.R. 767, 772, 2 K.B. 215, 224 ("If a husband who had admittedly entered into an agreement of this kind were in some way to take advantage of it, the doctrine would apply.") *Durham, Fancy Goods Ltd. v. Michael Jackson (Fancy Goods) Ltd.*, [1968] 2 All E.R. 987, 991 ("Lord Caims [in the *Hughes* case] in his enunciation of the principle assumed a pre-existing contractual relationship between the parties, but this does not seem ... to be essential, provided that there is a pre-existing legal relationship which could in certain circumstances give rise to liabilities and penalties. Such a relationship is created [in this case] by (a) [Section]

A further limitation on promissory estoppel in England is that the doctrine may be asserted only as a defensive plea; one cannot - as in the *Hoffman* case - sue for breach of a promise unsupported by consideration on the basis of estoppel. In a celebrated passage from the *High Trees* case,<sup>121</sup> Lord Denning stated that the courts have not gone "so far as to give a cause of action in damages for breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel."<sup>122</sup> The proposition that promissory estoppel is a shield, not a sword, was again emphasized by Lord Denning in *Combe v. Combe*<sup>123</sup>:

Much as I am inclined to favour the principle stated in the *High Trees* case, it is important that it should not be stretched too far, lest it should be enlarged. That principle does not create new causes of action, where none existed before. It only prevents a party from insisting upon his strict legal rights, when it would be unjust to allow him to enforce them, having regard to the dealings which have taken place between the parties ....<sup>124</sup>

Thus, promissory estoppel does not give rise to a cause of action in English law,<sup>125</sup> a proposition also generally followed in the Com-

108 of the Companies Act, 1948, (b) the fact that Mr. Jackson was a director of Jacksons [Co.] and (c) whatever contractual arrangement existed between the plaintiffs and Jacksons which led to the plaintiffs drawing a ninety-day bill on Jacksons.").

<sup>121</sup> *Central London Property Trust, Ltd. v. High Trees House, Ltd.* [1947] 1 K.B. 130, [1956] 1 ALL E.R. 256, discussed *supra* note 108.

<sup>122</sup> *Id.* at 134.

<sup>123</sup> [1951] 2 K.B. 215, 1 All E.R. 767.

<sup>124</sup> *Id.* at 219, 1 All E.R. 767, 769. Lord Denning relied on *Re Wm. Porter & Co., Ltd.*, [1937] 2 All E.R. 361; *Buttery v. Pickard*, [1946] 174 L.T. R. 144; *Central London Property Trust, Ltd. v. High Trees House, Ltd.* [1947] 1 K.B. 130; *Ledingham v. Bermejo Co. Ltd.* [1947] 1 All E.R. 749; *Robertson v. Minister of Pensions*, [1949] 1 K.B. 227; *Charles Rickards, Ltd. v. Oppenheim*, [1950] 1 K.B. 616; *Perrott & Co., Ltd. v. Cohen*, [1951] 1 K.B. 705; *Foster v. Robinson*, [1951] 1 K.B. 149. Commenting on these cases, he said:

In none of these cases was the defendant sued on the promise, assurance, or assertion as a cause of action in itself. He was sued for some other cause, for example, a pension or breach of contract ... and the promise, assurance, or assertion only played a supplementary role, though, no doubt, an important one. That is, I think, its true function. It may be part of a cause of action, but not a cause of action in itself.

*Id.* at 220, 1 All E.R. 767, 770.

<sup>125</sup> See, e.g., *Lyle-Meller v. A. Lewis & Co. (Westminster), Ltd.*, [1956] 1 All E.R. 247, 250-251 ("We have reached a new estoppel which affects legal relations ....

monwealth.<sup>126</sup> Common law writers express the fear that allowing a cause of action for promissory estoppel would give rise to an action in contract without consideration.<sup>127</sup>

### (B) Is *Culpa in Contrahendo* the Civilian Equivalent of Promissory Estoppel?

It is believed that in civil law, the German doctrine of *culpa in contrahendo*<sup>128</sup> performs a function similar to that of promissory estop-

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The assurance was not a contract binding in law, but it was an assurance as to the future ... as to the legal position — as to the legal consequences ... it did prevent the party making it from setting up a defence which would otherwise be open to him. In that sense it gave rise to an estoppel, but it was not the old kind of estoppel which was only a rule of evidence. It was the new kind of estoppel which affects legal relations.”); *Beesly v. Hallwood Estates, Ltd.*, [1960] 2 All E.R. 314, 324, aff’d [1961] 1 All E.R. 90 (“The doctrine [of promissory estoppel] may afford a defence against the enforcement of otherwise enforceable rights; it cannot create a cause of action.”); *Amalgamated Property Co., Ltd. v. Texas Bank (CA.)* [1981] 3 W.L.R. 565, 584 (“I would regard as the true proposition of law, that, while a party cannot in terms found a cause of action on an estoppel, he may, as a result of being able to rely on an estoppel, succeed on a cause of action on which, without being able to rely on that estoppel, he would necessarily have failed.”); *Syros Shipping Co., S.A. v. Elaghill Trading Co.*, [1980] 3 All E.R. 189, 191 (“In the present case the owners ... have no independent cause of action: they are suing on the naked promise to pay. ... [they] are using equitable estoppel as a sword and not as a shield; and that they cannot do.”).

<sup>126</sup>On Canadian law *see, e.g.*, *Cull v. Canadian Superior Oil Ltd.*, 20 D.L.R.3d 360 (1971); *Sohio Petroleum Co. v. Weyburn Security Co.*, 13 D.L.R. 340 (1970); *Frankel Structural Steel Ltd. v. Goden Holdings Ltd.*, 5 D.L.R.3d 15 (1969); *Canadian Super Oil Ltd. v. Murdoch*, 4 D.L.R.3d 629 (1969); *Canadian Superior Oil Ltd. v. Padon-Hughes Dev. Co.*, 3 D.L.R.3d 10 (1969); *John Burrows Ltd. v. Subsurface Surveys Ltd.*, 68 D.L.R.2d 354 (1968); *Conwest Exploration Co., Ltd. v. Letain*, 41 D.L.R.2d 198 (1964); *see generally MacRoe, The Extension of Options and Equitable Estoppel*, 3 CAN. B. L.J. 426 (1979).

On Australian law, *see, e.g.*, *Gardner v. Commissioner of Probate Duties*, W.A.R. 106, 108 (1967). *See generally Punch, Promissory Estoppel in New South Wales*, 1 U.N.S.W. L.J. 355 (1976); *Sedden, Is Equitable Estoppel Dead or Alive in Australia*, 24 INT. 7 COMP. L.Q. 438 (1975).

<sup>127</sup>*See, e.g.*, BOWER & TURNER, *supra* note 1, at 387:

It would seem to be impossible to allow promissory estoppel to found a cause of action without completely revising accepted ideas on the essentiality of consideration in contract; promissory estoppel deals with promises of a contractual nature, albeit they are made without consideration and to give a plaintiff a cause of action on a promissory estoppel must be little less than to allow an action in contract where consideration is not shown.

*See also* S. SUTTON & S. SHANNON, *CONTRACTS* 84 (7th ed. 1970), (“Whatever its exact scope, the doctrine (of equitable estoppel) provides only a defence. It can be ‘used as a shield and not as a sword.’”); J. WILSON, *PRINCIPLES OF THE LAW OF CONTRACT* 63 (1957), (“Quasi-estoppel is purely a defensive weapon and cannot be used as a sole cause of action.”)

<sup>128</sup>*See generally*, Comment, *A Call for a Common Law Culpa in Contrahendo Counterpart*, 15 U. S. F. L. REV. 587 (1981); Sanders, *Culpa in Contrahendo: Origin, Theory, Possible Utility in Louisiana*, 22 LA. B. J. 285 (1975); Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom of Contract: A Comparative Study*, 77 HARV. L. REV. 401 (1964); Schwenk, *Culpa in Contrahendo in German*,

pel. This doctrine dates back to 1861 when Jhering published a famous article in which he argued that a party who by his conduct during negotiations for a contract brings about its invalidity, or prevents its formation or perfection, should be liable for his fault to the innocent party who relied upon the validity of the contract. The purpose of the doctrine is to restore the parties to the status quo. Hence, the "blameworthy" party is liable only for reliance damages; his liability does not result in compensation for the value of the promised performance. The doctrine, as such, protects the negative rather than the positive interest of the parties.

The German Civil Code recognizes the doctrine of *culpa in contrahendo* in cases involving contracts voidable because of mistake,<sup>129</sup> impossibility of object,<sup>130</sup> or illegality.<sup>131</sup> The Louisiana Civil

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*French and Louisiana Law*, 15 TUL. L. REV. 87 (1940); Note, *Measure of Recovery for Change of Position under Unenforceable Contract—Culpa in Contrahendo*, 25 TUL. L. REV. 133 (1950). See also Palmer, *Contractual Negligence in the Civil Law - The Evolution of a Defense to Actions for Error*, 50 TUL. L. REV. 1 (1975); Hoff, *Error in the Formation of Contracts in Louisiana: A Comparative Analysis*, 53 TUL. L. REV. 329 (1979).

<sup>129</sup>German Civ. Code Art. 119 (Rescission due to error):

- (1) A person who, when making a declaration of intention, is in error as to its content, or did not intend to make a declaration of such content at all, may rescind the declaration if it may be assumed that he would not have made it with knowledge of the facts and with reasonable appreciation of the situation.
- (2) An error as to the content of the declaration is regarded in the same way as an error as to those characteristics of a person or thing which are regarded in business as essential.

Art. 120 (Rescission because of incorrect transmission):

A declaration of intention which has been incorrectly transmitted by the person or institution employed for its transmission may be rescinded under the same condition as a declaration of intention made in error as provided for by § 119.

Art. 122 (Rescinding party's obligation to compensate):

- (1) If a declaration of intention is void under § 118, or rescinded under § 119, 120, the declaration shall, if the declaration was required to be made to another party, compensate that party, or otherwise any third party, for the damage which the other or the third party has sustained by relying upon the validity of the declaration; not, however, beyond the value of the interest which the other or the third party has in the validity of the declaration.
- (2) The obligation to compensate does not arise if the injured party knew the ground of the nullity or rescission or did not know it due to negligence (should have known it).

<sup>130</sup>German Civ. Code art. 307 (Negative interest):

- (1) If a person, in concluding a contract the performance of which is impossible, knew or should have known that it was impossible, he is obliged to make compensation for any damage which the other party has sustained by relying upon the validity of the contract; not, however, beyond the value of the interest which the other party has in the

Code also protects the negative interest in cases of rescission for error<sup>132</sup> and in cases involving the sale of a thing owned by another.<sup>133</sup> In practice, however, the doctrine as a general theory has limited application in Louisiana courts. Few courts refer to it,<sup>134</sup> and none to the present writer's knowledge has based recovery exclusively upon it. The status of the doctrine in Louisiana is illustrated by two cases. In *Coleman v Bossier City*,<sup>135</sup> plaintiffs (real estate developers) sued to recover from the city (defendant) expenses incurred in constructing water and sewerage facilities that later became a part of the city system. The agreement between the parties was unenforceable because it did not comply with the procedures required by the public bidding statute. The

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validity of the contract. The duty to make compensation does not arise if the other party knew or should have known of the impossibility.

- (2) These provisions apply *mutatis mutandis* if the performance is only partially impossible, and the contract is valid in respect of the possible part, or if only one of several alternative acts of performance promised is impossible.

<sup>131</sup>German Civ. Code art. 309 (Illegal contract): "If a contract is contrary to a statutory prohibition, the provisions of § 307, 308 apply *mutatis mutandis*."

<sup>132</sup>LA.CIV. CODE Art. 1952 provides that:

A party who obtains a rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error. The Court may refuse rescission when the effective protection of the other party's interest requires that the contract be upheld. In that case, a reasonable compensation for the loss he has sustained may be granted to the party to whom rescission is refused.

Comment (e) explains that:

Under this Article, when the interest of the party not in error can be protected only by upholding the contract, a reasonable compensation may be granted to the party in error if the upholding results in unfair detriment to the latter. Thus, if through error a party conveyed to another a piece of property different from the one he intended to sell, and the transferee then built valuable improvements upon the property, it would seem that the transferee could be protected only by upholding the contract. If the property actually conveyed was considerably more valuable than the one intended, however, the transferee would obtain a great advantage if this were done. In such a case, an award of reasonable compensation to the transferor would insure a fair solution ....

<sup>133</sup>LA. CIV. CODE art. 2452:

The sale of a thing belonging to another person is null; it may give rise to damages, when the buyer knew not that the thing belonged to another person.

<sup>134</sup>*See, e.g.,* Hagber v. John Bailey Contractor 435 So.2d 580, 586 (La. App. 3rd Cir. 1983), writ denied 444 So.2d 1245 (La. 1984); Sanders v. United Distributors, Inc., 405 So. 2d 536, 537 (La. App. 4th Cir. 1981), writ denied, 410 So. 2d 1130, (La. 1982); Snyder v. Champion Rlty. Corp., 631 F.2d 1253, 1255-56 (5th Cir. 1980); Unit two Architects, Inc. v. Modica, 376 So.2d 979, 980 (La. App. 1st Cir. 1979), writ denied 380 So. 2d 72 (La. 1980); West Baton Rouge Parish School Bd. v. T.R. Ray, Inc., 367 So. 2d 332, 335 (La. 1979).

<sup>135</sup>305 So.2d 444 (La. 1974).



court addressed the question whether "the plaintiffs may recover for actual expenses incurred in reliance upon these invalid contracts."<sup>136</sup> The court stated:

[T]he action to recover costs expended in reliance upon an invalid contract might, in civil law theory, be based upon the doctrine of *culpa in contrahendo* rather than upon that of unjustified enrichment (the *actio de in rem verso*). Under the former doctrine, the essential basis for such a responsibility is a fault in contracting which gives rise to a quasi-contractual obligation to pay the loss so incurred. The essential purpose is to afford a recovery to a person who has changed his position in reliance upon a nonenforceable contract, at least to the extent of the expenses so incurred by him which are not in excess of the value of the benefits received by the other party.<sup>137</sup>

The court, however, ultimately based its decision on a theory of unjust enrichment, allowing recovery for the actual cost of the material, services, and labor.<sup>138</sup> The court distinguished *culpa in contrahendo* from unjustified enrichment by asserting that the former is based on "fault in contracting."<sup>139</sup> Guided by the enrichment rather than by the fault standard, the court limited recovery to the expenses "not in excess of the value of the benefits received by the other party."<sup>140</sup> This formula, in effect, disallows all reliance expenses that do not result in a benefit to the defendant. Conferral of a benefit, however, is not a requirement of *culpa in contrahendo*, and such a limitation undermines the utility of the doctrine. The *Coleman* case, therefore, does not furnish solid authority for the application of *culpa in contrahendo* in Louisiana.

This confusion was seen again in *Snyder v. Champion RITY Corp.*,<sup>141</sup> where plaintiffs (three real estate brokers) were engaged by defendant as non-exclusive agents for the sale of land in Louisiana. Defendant agreed to pay the brokers a commission only if they brought about a cash sale at a price higher than \$125 per acre. The brokers

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<sup>136</sup>*Id.* at 445.

<sup>137</sup>*Id.* at 447.

<sup>138</sup>*Id.*

<sup>139</sup>*Id.*

<sup>140</sup>*Id.*

<sup>141</sup>631 F.2d 1253 (5th Cir. 1980).

introduced defendant to a buyer willing to pay \$150 an acre, but the parties could not consummate a sale at that price. Thereafter, the parties on their own initiative conferred and reached an agreement for a sale on credit at \$117.50 per acre. The agreement mentioned nothing about a commission for the plaintiffs and none was owed under the real estate brokerage contract.<sup>142</sup> Plaintiffs brought an action based on the theory of unjust enrichment. To recover under this theory, the court stated, "a broker must be the 'procuring cause' of the final sale."<sup>143</sup> The Court then said:

The plaintiffs, somewhat uncertain how to pigeonhole their claim, argue that, despite the terms of the brokerage contract, (defendant) is guilty of "legal fault", a kind of constructive bad faith, under the civilian doctrine of culpa in contrahendo. The doctrine is, in general terms, the civilian equivalent of the common law concept of promissory estoppel. It is used as a basis for compensating one party for his expenses incurred in reliance on another party's offer to form a unilateral contract where that offer is withdrawn before acceptance. It has nothing to do with this case.<sup>144</sup>

The court held that there was no "fault" or bad faith on the part of defendant. The court distinguished between the "mere act of selling to the broker's buyer without cutting in the broker"<sup>145</sup> and the "active interference with the brokers' ability to earn their contractual commissions."<sup>146</sup> The former case, the court said, does not establish bad faith,<sup>147</sup> and plaintiffs were left without remedy.

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<sup>142</sup>*Id.* at 1254. *See, e.g.*, German Civ. Code art. 652 (Forrester, Goren, Ilgen's trans. 1975), which provides:

- (1) A person who promises a broker's fee for information of the opportunity of making a contract or for the procurement of a contract, is bound to pay the fee only if the contract is concluded in consequence of the procurement by the broker. If the contract is concluded subject to a condition precedent, the broker's fee may not be demanded until the condition is fulfilled.
- (2) The broker is entitled to be reimbursed for outlay incurred only if this has been agreed upon. This applies even if a contract is not concluded.

<sup>143</sup>*Id.* at 1255 n. 3.

<sup>144</sup>*Id.* at 1255-1256.

<sup>145</sup>*Id.* at 1256.

<sup>146</sup>*Id.*

<sup>147</sup>*Id.*

What is troubling in the *Snyder* decision is its limited reading of the scope of the *culpa in contrahendo* doctrine. While it is true that the doctrine may provide a "basis for compensating one party for his expenses incurred in reliance on another's offer to form a unilateral contract where that offer is withdrawn before acceptance",<sup>148</sup> this, as indicated,<sup>149</sup> is not its only application. Nevertheless, the doctrine would still have been of no use to plaintiffs in the *Snyder* context since there was no evidence of fault on the part of defendant.

Also disturbing is the court's characterization of *culpa in contrahendo* as "the civilian equivalent of the common law concept of promissory estoppel."<sup>150</sup> This is not new; it has long been suggested that the two doctrines are "identical."<sup>151</sup> It may be admitted that both doctrines serve a similar function in protecting the reliance interest. Similarity, however, is not identity.

*Culpa in contrahendo* presupposes fault, whereas promissory estoppel operates whether or not the party inducing reliance is at fault. Issues of fault, fraud, misrepresentation, bad faith or good faith are not part of the judicial inquiry in a promissory estoppel case. Furthermore, *culpa in contrahendo* has been classified as a contractual doctrine<sup>152</sup> merely because the German Civil law has not adopted a general principle of delictual liability under which a person is liable for all injuries caused by his fault. German delictual law consists of individual delicts; the "negligent causing of mere pecuniary harm, as distinct from injury to the person or property is not one of them."<sup>153</sup> The doctrine of *culpa in contrahendo* fills the gap by providing a basis for recovery of pecuniary losses where there is no contract because of the fault of one of the negotiating parties. The doctrine of promissory estoppel, as opposed to

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<sup>148</sup>*Id.* at 1255-1256.

<sup>149</sup>See *supra* notes 129-134 and accompanying text.

<sup>150</sup>1631 F.2d 1253, 1255 (5th Cir. 1980).

<sup>151</sup>Schwenk, *Culpa In Contrahendo In German, French and Louisiana Law*, 15 TUL. L. REV. 87, 88 (1940).

<sup>152</sup>The doctrine found its origin in the Roman law of obligations, which recognized that an injured party could be awarded a remedy even when the contract was void. Ihering borrowed this concept to argue that although a contract may be null, its nullity does not necessarily mean that it has no effect. *Id.*

<sup>153</sup>Kessler & Fine, *Culpa in Contrahendo, Bargaining in Good Faith and Freedom Of Contract: A Comparative Study*, 77 HARV. L. REV. 400 (1964).

culpa in contrahendo, is not concerned with issues relating to the promisor's behavior. Misconduct is irrelevant to the question of reliance.<sup>154</sup> A common law court could perhaps have utilized the doctrine of promissory estoppel in the *Snyder* case to avoid hardship to the brokers, who had spent time and money and had attracted a purchaser for the property, although they had not been successful in procuring the price stipulated by the brokerage contract.<sup>155</sup> Promissory estoppel lia-

<sup>154</sup>See, e.g., *Citizens State Bank v. Peoples Bank*, 475 N.E.2d 324, 327 (Ind. Ct. App. 1 Dist. 1985) ("Actual fraud on the part of the promisor is not a requisite for the application of promissory estoppel"); *Kiely v. St. Germain*, 670 P.2d 764, 767 (Colo. 1983), ("[F]raudulent conduct by the promisor is not an element of promissory estoppel. Other civil remedies and criminal sanctions are available to deter fraudulent conduct when injustice to a promisee who reasonably and justifiably relies on a promise can be prevented only by recognizing a right of recovery from the promisor ... absence of fraudulent conduct can(not) defeat the claim for recompense"); *Burst v. Adolph Coors Company*, 503 F.Supp. 19, 22 (E.D. Mo. 1980) ("As distinguished from fraud, the doctrine of promissory estoppel is not concerned with the good faith or bad faith of the promisor in making the promise allegedly relied on. That is irrelevant to the issue of whether an enforceable promise was in fact made.").

<sup>155</sup>On the application of promissory estoppel to real estate brokerage transactions, see, e.g., *Coldwell Banker & Co. v. Karlock*, 686 F.2d 596 (9th Cir. 1982); *Snyder v. Champion Rity Corp.*, 631 F.2d 1253 (5th Cir. 1980); *UTL Corp. v. Marcus*, 589 S.W.2d 782 (Tex. App. 1979); *Christo v. Ramada Inns, Inc.*, 609 F.2d 1058 (3rd Cir. 1979). See generally Comment, *Exclusive Sales Rights Given to Real Estate Brokers*, 6 DEPAUL L. REV. 107 (1956); Note, *Special Conditions in Real Estate Brokerage Contracts*, 32 COLUM. L. REV. 1194 (1932); see also *Stoljar, Prevention and Co-operation in the Law of Contract*, 31 CAN. B. REV. 231, 243-49 (1953). Traditional doctrine allows the owner to withdraw his offer to pay the broker a commission any time before complete performance by the broker, even when the broker has started searching for a purchaser. See, e.g., *Res Rivieres v. Sullivan*, 247 Mass. 443, 142 N.E. 111 (1924); *Walsh v. Grant*, 256 Mass. 555, 152 N.E. 884 (1926); *Elliot v. Kazjian*, 255 Mass. 459, 152 N.E. 351 (1926); *Bartlett v. Keith*, 325 Mass. 265, 90 N.E.2d 308 (1950). A number of theories have been suggested to ease the harshness of the traditional rule. Some courts have interpreted the owner's offer as seeking merely a promise in return from the broker to use his best efforts to try to procure a purchaser. See, e.g., *Jones v. Hollander*, 3 N.J.M. 973, 130 A. 451, 452 (N.J. 1925) ("[T]he consideration is the agreement of the broker to try to obtain a purchaser and his actual efforts in that regard . . ."); *Harris v. McPherson*, 97 Conn. 164, 115 A. 723, 724 (Conn. 1922) ("[when the broker] used reasonable efforts to procure a purchaser . . . and expended money and time in so doing [there] was such an acceptance of the offer . . . as created a mutual contract."); *Braniff v. Blair*, 101 Kan. 117, 165 P. 816, 817 (1917) ("The . . . promise of defendants was unilateral when made; but, when it was accepted by the agents and they had spent time, effort, and money in carrying out its provisions . . . it became a mutual and binding obligation."); *Bell v. Dimmerling*, 49 Ohio St. 165, 78 N.E.2d 49, 52 (Ohio 1948) ("[C]onceding that at the time the 'contract' was signed and accepted it was a mere nudum pactum, when plaintiff exerted efforts to find a purchaser for the property, consideration was supplied....").

Section 45 of the Second Restatement of Contracts has also been utilized to avoid the hardship of a broker who has spent time and money in an effort to sell the owner's property and may have created a market or stimulated a demand for the property but has not been successful in procuring a purchaser. The section provides that:

- (1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is

bility in the case would have depended on compliance with the terms of the brokerage contract, enrichment of the property owner, or fault on his part.

Consequently, resisting the doctrine of promissory estoppel in a civil law system on the ground that culpa in contrahendo serves the same function is without merit. Also inaccurate is the assertion made by a Louisiana court that "from a delictual viewpoint, La. Civ. Code 2315 is broad enough to encompass an action for detrimental reliance."<sup>156</sup> Under article 2315, "Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it."<sup>157</sup> Article 2316 also provides that "Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill."<sup>158</sup> Both articles require "fault" or "negligence." Here again, it must be clear that promissory estoppel liability does not require fault or a negligent defendant.

In this regard, common-law and civil-law approaches to problems of liability arising during negotiations are different. As indicated,<sup>159</sup> traditional common law treats these problems as contractual. Pre-contractual liability in civil law depends on whether abandonment of negotiations was accompanied by fault. Consequently, to establish a defendant's liability in a *Hoffman* type case,<sup>160</sup> a civilian judge must find fault on the part of the negotiating party who terminates negotia-

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created when the offeree tenders or begins the invited performance or tenders a beginning of it.

- (2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

*See, e.g.,* Marchiondo v. Scheck, 78 N.M. 440, 432 P.2d 405, 407 (1967); Tetrick v. Sloan, 170 Cal. App.2d 540, 339 P.2d 613, 616 (1959); Jenkins v. Vaughan, 197 Tenn. 578, 276 S.W.2d 732, 733 (1955); Baumgartner v. Meek, 126 Cal.App.2d 505, 272 P.2d 552, 554 (Cal. App. 3rd Dist. 1954).

On brokerage agreements in Louisiana, *see generally*, Comment, *The Law of Real Estate Brokerage Contracts: The Broker's Commission*, 41 LA. L. REV. 857 (1981); Comment, *Real Estate Brokerage in Louisiana*, 17 LA. L. REV. 820 (1957).

<sup>156</sup>*Simmons v. Sowela Technical Institute*, 470 So.2d 913, 923 (La. App. 3rd Cir. 1985); *see also* *Sanders v. United Distributors*, 405 So.2d 536, 537 (La. App. 4th Cir. 1981), *writ denied* 410 So.2d 1130 (La. 1982), discussed *supra* notes 28-31 and accompanying text.

<sup>157</sup>LA. CIV. CODE art. 2315.

<sup>158</sup>LA. CIV. CODE art. 2316.

<sup>159</sup>*See supra* note 112 and accompanying text.

<sup>160</sup>*Hoffman v. Red Owl Store, Inc.*, 26 Wis. 2d 683, 133 N.W.2d 267 (1965), discussed *supra* notes 113-114 and accompanying texts.

tions after having encouraged the other party to incur preparatory expenses.

This result was reached by the highest court in Germany on the basis of the concept of "wrongful conduct" during negotiations. The court recognized the general rule that mere interruption of negotiation does not necessarily trigger the application of the doctrine of *culpa in contrahendo*. The duty to compensate does not arise even if the negotiating party ceases negotiations knowing that the other party had incurred expenses in reliance on the prospective contract. The court stated, however, that *willful* conduct creating an impression that the execution of the contract will occur might change this rule. Based on the finding of such willful conduct, the German court concluded that "the defendant has induced Plaintiff to rely on the assumption that a contract would be arrived at with certainty, [and] the party terminating the negotiation is liable for all expenses incurred by the other party in the belief that a contract would be concluded."<sup>161</sup>

### (C) Good Faith, Abuse of Rights and Termination at Will Clauses

At civil law, the concept of good faith may serve some of the functions of promissory estoppel in cases involving at-will relationships. The Louisiana Civil Code, unlike the Uniform Commercial Code<sup>162</sup> and the Second Restatement of Contracts,<sup>163</sup> calls for good

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<sup>161</sup>BGH, July 14, 1967, NJW P.2199 cited in H. DE VRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER, 367 (1976).

<sup>162</sup>According to section 1-203 of the Uniform Commercial Code, "[e]very contract or duty within this Act imposes an obligation of good faith in its performance or enforcement."

For discussion of the good faith requirement under the Uniform Commercial Code, see generally Burton, *Good Faith Performance of a Contract Within Article 2 of the Uniform Commercial Code*, 67 IOWA L. REV. 1 (1981); Stankiewicz, *Good Faith Obligation in the Uniform Commercial Code: Problems in Determining its Meaning and Evaluating its Effect*, 7 VA. L. REV. 389 (1973); Eisenberg, *Good Faith Under the Uniform Commercial Code - A New Look at an Old Problem*, 54 MARQ. L. REV. 1 (1971); Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 3 U. CHI. L. REV. 666 (1983); Note, *Good Faith Under the Uniform Commercial Code*, 23 U. PITT. L. REV. 754 (1962).

<sup>163</sup>Section 205 of the Second Restatement of Contracts provides that "Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement." Comment (c) to the section explicitly states that "this section, like Uniform Commercial Code section 1-203, does not deal with good faith in the formation of a contract."

Interestingly, the comment mentions detrimental reliance under section 90 as a possible theory to be applied to particular forms of bad faith bargaining. However, as

faith not only in the performance and enforcement of the contract,<sup>164</sup> but at the stage of contract formation as well. Under article 1759, "Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation."<sup>165</sup>

Promissory estoppel has been invoked in American law as an alternative basis of liability in cases involving a franchisee who incurred expenses in reliance upon a promise of franchise that the franchisor could by right terminate at will. For instance, in the famous case of *Goodman v. Dicker*,<sup>166</sup> Dicker was encouraged by Goodman, a local representative of Emerson Radio and Phonograph Co., to apply for an Emerson dealer franchise for the District of Columbia. Dicker was induced by Goodman's representation to make certain expenditures including hiring salesmen and soliciting orders. Dicker was told by Goodman that the franchise application had been accepted and would be granted, and that an initial delivery of radios was on the way. None were delivered and the franchise was not granted. The Court held that Dicker justifiably relied upon Goodman's statement and conduct, even though, under a formal franchise agreement, a franchise would have been terminable at will and would have imposed no duty on the manufacturer to continue the franchise for any length of time. The Court stated that "justice and fair dealing require that one who acts to his detriment on the faith of conduct of the kind revealed here should be protected by estopping the party who has brought about the situation from alleging anything in opposition to the natural consequences of his

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discussed above, good or bad faith normally is not a part of a promissory estoppel inquiry. See *supra* note 156 and accompanying text.

<sup>164</sup>LA. CIV. CODE art. 1983 provides:

Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.

<sup>165</sup>LA. CIV. CODE art. 1759. Good faith, therefore, is one of the fundamental bases which underlie the law of obligations under the Louisiana Civil Code.

In addition to articles 1759 and 1983, "good faith" appears in several other articles. See, e.g., LA. CIV. CODE arts. 1996, 1963, 1975, 2021, 2035.

See also, Italian Civ. Code art. 1337, entitled "Negotiations and Precontractual Liability", which provides that "The parties shall act in good faith in conducting negotiations and formation of the contracts." The Italian Code also provides that "The contract shall be interpreted according to good faith." art. 1366, and that "the contract shall be performed according to good faith." Art. 1375, reprinted in L. DEL DUCA & P. DEL DUCA, *COMMERCIAL BUSINESS AND TRADE LAWS*, (Italy 1983).

<sup>166</sup>F.2d 684 (D.C. Cir. 1948). For discussion of the Goodman case, see, e.g., Note, *Contracts, Promissory Estoppel, Reliance* VA. L. REV. 266 (1949).

own conduct."<sup>167</sup> The Court allowed plaintiff to recover \$1,150 expended in preparation for the prospective business; however, loss of profits of \$350 on the undelivered radios was not recoverable, as it was not a loss incurred in reliance upon the assurance of the franchise.<sup>168</sup>

Promissory estoppel has also been utilized by American courts in cases involving an employee who abandons his former employment and incurs moving expenses in reliance upon a terminable at will<sup>169</sup> promise

<sup>167</sup>169 F.2d at 685.

<sup>168</sup>However, expectation damages were granted in *Chrysler Corporation v. Quimby*, 51 Del. 264, 144 A.2d 123 (1958), where defendant made assurances of an automobile dealership even though it had no intention of granting one. For other cases in which promissory estoppel was argued as a basis of the manufacturer's liability, see, e.g., *Walker v. KFC Corp.*, 728 F.2d 1215 (9th Cir. 1984); *Rogue Valley Stations, Inc. v. Birk Oil Co.*, 568 F.Supp. 337 (D.C. Or. 1983); *Coral Gables Imported Motorcars v. Fiat Motors*, 673 F.2d 1234 (1982); *RCM Supply Co., Inc. v. Hunter Douglas, Inc.*, 686 F.2d 1074 (1982); *Triology Variety Stores, Ltd. v. City Products Corp.*, 523 F.Supp. 691 (S.D.N.Y. 1981); *Klinke v. Famous Recipe Fried Chicken, Inc.*, 24 Wash. App. 202, 600 P.2d 1034 (1980); *Wojciechowski v. Amoco Oil Co.*, 483 F.Supp. 109 (E.D.Wis. 1980); *Corenswet, Inc. v. Amana Refrigeration, Inc.*, 594 F.2d 129 (5th Cir. 1979); *Parade Oil Co., Inc. v. Phillips Petroleum Co.*, 320 A.2d 769 (Del. ch. 1974); *Scott-Douglas Corp. v. Greyhound Corp.*, 304 A.2d 309 (Del. Super. 1973); *L.S. Good & Company v. H. Daroff & Sons, Inc.*, 279 F.Supp. 925 (N.D.W.Va. 1968); *Wright v. United States Rubber Company*, 280 F.Supp. 616 (D.C.Or. 1967); *Metropolitan Convoy Corp. v. Chrysler Corp.*, 58 Del. 286, 208 A.2d 519 (Del. 1965); *Whorral v. Drewrys Limited, U.S.A. Inc.*, 214 F.Supp. 269 (S.D.Iowa 1963); *Rennie & Laughlin, Inc. v. Chrysler Corporation*, 242 F.2d 208 (9th Cir. 1957). *But see Prince v. Miller Brewing Company*, 434 S.W.2d 232 (Tex. Ct. App. 1968).

<sup>169</sup>In employment relationships of indefinite duration, the classical rule is that "All may dismiss their employee(s) at will, be they many or few, for good cause, for no cause, or even for cause morally wrong, without being guilty of legal wrong."

*Payne v. Western & Atlantic R.R. Co.*, 81 Tenn. 507 (1884), *overruled on other grounds* in *Hutton v. Walters*, 132 Tenn. 527, 179 S.W.134, 138 (1915), ("[M]en must be left without interference to buy and sell where they please, and to discharge or retain employees at will for good cause or for no cause, or even for bad cause without thereby being guilty of an unlawful act per se.").

The employment-at-will doctrine found support in the traditional theory of contract law. The doctrine has been justified on the basis that "men should have the greatest possible liberty to make such contracts as they please. *M. Witmark & Sons v. Fred Fisher Music Co.*, 125 F.2d 949, 962 (2d Cir. 1942), *aff'd* 318 U.S. 643 (1943).

Despite the decay in the rationale behind the at-will doctrine, it still prevails in modern employment law in most jurisdictions. See, e.g., *Perri v. Byrd*, 436 So.2d 359 (Fla. Dist. Ct. App. 1983); *Hamlen v. Fairchild Industries, Inc.* 413 So.2d 800 (Fla. Dist. Ct. App. 1982); *Bender Ship Repair, Inc. v. Stevens*, 379 So.2d 594 (Ala. 1980); *Martin v. Tapley*, 360 So.2d 708 (Ala. 1978).

However, the right of an employer to discharge an at-will employee has been restricted by a number of judicial exceptions. See generally Comment, *The At-Will Doctrine, A Proposal to Modify the Texas Employment Relationship*, 36 BAYLOR L. REV. 667 (1984); Rohwer, *Terminable-At-Will Employment: New Theories for Job Security*, 15 PAC. L.J. 759 (1984); Note, *Master and Servant: Employment-At-Will- Personnel Manual One Factor of Totality of Circumstances To Create Contractual Right to Just Cause Dismissal*, 14 SETON HALL 396 (1984); Heying, *Wrongful Termination: A New Common Law Remedy for Employees-At-Will?*, 72 ILL. B.J. 584 (1984); Decker,



of employment. In the leading case of *Grouse v. Group Health Plan, Inc.*,<sup>170</sup> an employee left his former employment in reliance on the employer's promise, only to be soon fired. The Court stated that the employee "had a right to assume he would be given a good faith opportunity to perform his duties to the satisfaction of [the employer] once he was on the job."<sup>171</sup> The Court continued: "[the employee] was not only denied that opportunity but resigned the position he already held in reliance on the firm offer which [the employer] tendered him."<sup>172</sup> On the basis of promissory estoppel, the Court awarded the employee reliance damages, stating that "the measure of damages is not so much what he would have earned from [the employer] as what he lost in quitting the job he held and in declining at least one other offer of employment elsewhere."<sup>173</sup>

"Termination at will" clauses are legally valid under the Louisiana Civil Code. According to Louisiana Civil Code article 2747, "A man is at liberty to dismiss a hired servant attached to his person or family, without assigning any reason for so doing. The servant is also free to depart without assigning any cause."<sup>174</sup> The at will clause amounts to a conditional obligation of a resolutive nature.<sup>175</sup> Although the condition depends solely on the obligor's will, it does not make the obligation null as long as the right to terminate is exercised in good faith.<sup>176</sup> A contract

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*At-Will Employment: A Proposal for its Statutory Regulation*, 1 HOFSTRA LAB. L.F. 187 (1983).

<sup>170</sup>306 N.W.2d 114 (Minn. 1981).

<sup>171</sup>*Id.* at 116.

<sup>172</sup>*Id.*

<sup>173</sup>*Id.*

<sup>174</sup>LA. CIV. CODE art. 2747.

<sup>175</sup>LA. CIV. CODE art. 1767:

A conditional obligation is one dependent on an uncertain event.

If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.

If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutive.

<sup>176</sup>LA. CIVIL CODE art. 1770

A suspensive condition that depends solely on the whim of the obligor makes the obligation null.

A resolutive condition that depends solely on the will of the obligor must be fulfilled in good faith.

Under prior law, a "termination at will" clause was regarded as a potestative clause rendering the obligation null. Comment (f) to the article gives the example of *Caddo Oil & Mining Co. v. Producers*, 64 So.684 (La. 1914), in which a clause provided that "It is expressly understood that the second party (lessee) reserves the right to abandon said premises ... whenever it desires to cease operations, and to remove all property placed thereon (by it), at its discretion." *Id.* at 687. The Court held that:

at will has an indefinite duration. Consequently, the party who terminates must give reasonable advance notice<sup>177</sup> "to avoid unwarranted injury to the interest of the victimized party."<sup>178</sup> If termination is improper, a court may order specific performance or grant damages<sup>179</sup> as necessary to protect the reliance interest of the victimized party.

Failure to comply with the requirement of good faith in at will relationships may also trigger the operation of the broader civilian doctrine of "abuse of rights." The doctrine covers various situations in which a party exercises a right with the intent to harm or without any legitimate or serious interest. It also applies to cases in which a party exercises a right contrary to the aims for which said right or power was conferred, or contrary to good morals or good faith.<sup>180</sup> Application of the abuse of rights doctrine to at will termination clauses may depend upon answering a number of threshold questions: Was the condition performed in the manner probably intended by the parties? What was the purpose of the terminating party? Was that purpose within the reasonable contemplation

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The condition is clearly potestative, that is to say, it made the execution of the contract depend upon the will of the (lessee), thereby destroying the obligation (imposed upon him), which was the 'legal tie' that gave ... (the lessor) the right to enforce the contract ... (from which) it follows that, there being no obligation resting upon the lessee, and hence no consideration moving to the lessor, there was no contract.

*Id.* at 688.

See generally, Palmer & Plauché, *A Review Of The Louisiana Law On Potestative Conditions*, 47 TUL. L. REV. 284 (1973); Brown, *The Potestative Condition In Louisiana*, 6 TUL. L. REV. 23 (1931); Brown, *Potestative Conditions and Illusory Promises*, 5 TUL. L. REV. 396 (1931); Note, *Contracts-Simple Potestative Conditions-Duty of Obligor*, 18 TUL. L. REV. 160 (1943).

<sup>177</sup>LA. CIV. CODE art. 2024:

A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.

<sup>178</sup>LA. CIV. CODE art. 2024, comment (e). In this regard, comment (f) to art. 1770 states that, "In order to comply with the requirement of good faith, a party exercising his right to terminate a contract at will should consider not only his own advantage, but also the hardship to which the other party will be subjected because of the termination."

<sup>179</sup>According to comment (f) to LA. CIV. CODE art. 1770, "The court may order either continuance of performance for the reasonable time necessary for the other party to overcome the hardship, or may grant damages to the party harmed by the termination." Damages are to be "assessed on the basis of an estimation of the reasonable duration of the contract had it not been terminated in bad faith."

<sup>180</sup>See generally, Cueto Rua, *Abuse Of Rights*, 35 LA. L. REV. 965 (1975); Comment, *"At Will" Franchise Terminations and the Abuse of Rights Doctrine: The Maturation of Louisiana Law*, 42 LA. L. REV. 210 (1981); Bogar, *Abuse of Rights in France, Germany and Switzerland: A Survey of a Recent Chapter in Legal Doctrine*, 35 LA. L. REV. 1015 (1975); Comment, *Abuse of Rights in Louisiana*, 7 TUL. L. REV. 426 (1933).

of the parties?<sup>181</sup> Application of the doctrine, therefore, focuses on the terms of the at will agreement and the behavior of the parties.

Promissory estoppel, as we have seen in cases like *Grouse v. Group Health Plan, Inc.*<sup>182</sup> and *Goodman v. Dicker*,<sup>183</sup> follows a different approach. It does not wrestle with inquiries as to the behavior of the terminating party or the purpose behind such termination; nor does it inquire into the terms of the bargain reached between the parties. Instead, promissory estoppel emphasizes the reliance of the non-terminating party, and whether it was reasonable and justifiable.

#### (D) Promise to Contract and the Problem of Indefiniteness

Promissory estoppel must also be distinguished from the civilian notions of "preliminary contract" and "promise to contract."<sup>184</sup> These notions were developed to give binding effect to promises made before a final agreement is reached by the parties. The promise to contract is unilateral when "one party obligates himself towards another to conclude a contract on the terms set forth upon the other party's consent to enter into the contemplated contract."<sup>185</sup> By virtue of this agreement, only one party is bound - the promisor. The final contract is formed when the other party, the promisee, gives his consent. A bilateral promise to contract exists when both parties, the promisor and the promisee, make mutual promises to conclude a final contract at a later date. Thus, unlike the case of a unilateral promise, the existence of the final agreement depends on the mutual assent of both parties. A promise to contract, whether unilateral or bilateral, is more than an offer, but less than the final contract. It is a contract in itself, however, and has binding effect as such. The offer or promise may not be withdrawn before the time agreed upon to finalize the agreement. The promise to contract as such may be specifically enforced by either party.<sup>186</sup>

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<sup>181</sup>Comment, 42 LA. L. REV. at 230-231.

<sup>182</sup>306 N.W.2d 114 (Minn. 1981), *supra* notes 172-175 and accompanying text.

<sup>183</sup>169 F.2d 684 (D.C. Cir. 1948), *supra* notes 168-170 and accompanying text.

<sup>184</sup>See generally, Litvinoff, *Of the Promise of Sale and Contract to Sell*, 34 LA. L. REV. 1017 (1974); Smith, *An Analytical Discussion of the Promise of Sale and Related Subjects, Including Earnest Money*, 20 LA. L. REV. 522 (1960).

<sup>185</sup>Litvinoff, 34 LA. L. REV. at 1020.

<sup>186</sup>For instance, under LA. CIV. CODE art. 2462:

A promise to sell, when there exists a reciprocal consent of both parties as to the thing, the price and terms, and which, if it relates to immov-

Nonetheless, to be binding, the promise to contract must contain all essential elements of the final agreement. Consequently, if a promise to sell does not specify the thing or the price, it fails for uncertainty.<sup>187</sup> Similarly, if the promise relates to immovables and fails to satisfy the required formalities,<sup>188</sup> the promise is null and may not be specifically enforced.<sup>189</sup> Can a party who relied upon the uncertain promise to his detriment obtain relief, in the alternative, on the basis of detrimental reliance? Promissory estoppel has been utilized in this fashion at common law. For instance, in the leading case of *Wheeler v. White*,<sup>190</sup> Wheeler owned a piece of property and wanted to develop it. He approached White who agreed in writing to obtain a \$70,000 loan for Wheeler to finance construction of a shopping center on the land. White further

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ables, is in writing, so far amounts to a sale, as to give either party the right to enforce specific performance of same.

One may purchase the right, or option to accept or reject, within a stipulated time, an offer or promise to sell, after the purchase of such option, for any consideration therein stipulated, such offer, or promise cannot be withdrawn before the time agreed upon; and should it be accepted within the time stipulated, the contract or agreement to sell, evidenced by such promise and acceptance, may be specifically enforced by either party.

A more general provision dealing with promise to contract appears in the Italian Civil Code, which provides that:

If a person who is bound to make a contract does not perform his obligation, the other party, when possible and unless he is bound by the instrument, can obtain a judgment producing the same effects as the contract which has been made.

In the case of contracts for the transfer of ownership of a specified thing or the establishment or transfer of another right, the action cannot be granted if the party who instituted it does not carry out his performance or does not offer to do so with the formalities prescribed by law, unless such performance cannot yet be demanded.

Italian Civ. Code art 2932 (1942) (Beltramo, Long & Merryman trans. 1969).

<sup>187</sup>See, e.g., *Driskell v. Sumlin*, 125 So.2d 778, 780 (La. Ct. App. 2nd Cir. 1960); *McMikle v. O'Neal*, 207 So.2d 922, 923-924 (La. Ct. App. 2nd Cir. 1968). See, generally, *Cascio's v. Schoenbrodt*, 431 So.2d 32 (La. Ct. App. 1st Cir. 1983); *Jesse F. Heard & Son v. Amy Gravel Co., Inc.*, 407 So.2d 1288 (La. Ct. App. 3rd Cir. 1981); *McGill v. Gem Builders, Inc.*, 393 So.2d 409 (La. Ct. App. 1st Cir. 1980); *Wometco Communications, Inc. v. Luts*, 357 So.2d 877 (La. Ct. App. 1st Cir. 1978); *Torrey v. Simon-Torrey, Inc.*, 307 So.2d 569 (La. 1974); *Books, etc., Inc. v. Krusheuski*, 266 So.2d 496 (La. Ct. App. 4th cir. 1972).

<sup>188</sup>LA. CIV. CODE art. 2440 states: "All sales of immovable property shall be made by authentic act or under private signature." It further provides that "every verbal sale of immovables shall be null, as well for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

<sup>189</sup>See, e.g., *Roy O. Martin Lumber Co. v. Saint Denis Securities Co.*, 225 LA. 51, 72 So.2d 257, 259 (1954); *Bordelon v. Crabtree*, 216 LA. 345, 43 So.2d 682, 683 (1949).

<sup>190</sup>385 S.W.2d 619 (Tex. Civ. App. 1964), rev'd 398 S.W.2d 93 (Tex. 1965). For a discussion of the case, see Note, *Extension of the Doctrine of Promissory Estoppel Into Bargained For Transactions*, 20 S.W.L.J. 656 (1966).

promised that in the event of his failure to obtain the loan elsewhere, he would lend Wheeler the necessary amount himself. Wheeler in return promised White \$5,000 for his services, plus a five-percent commission on all rentals obtained by White from the shopping center. However, the loan agreement failed to mention the amount of monthly payments, the amount of interest due, the method by which interest would be computed, and the time when the interest would be paid. Relying upon the loan promise, Wheeler demolished all buildings on the property in preparation for the construction of the shopping center. The loan, however, proved unobtainable and White refused to honor his promise to lend his own money to Wheeler. White argued that the contract was too indefinite to be enforceable. Wheeler successfully used promissory estoppel to defeat White's defense. The court awarded him reliance damages on the basis of promissory estoppel,<sup>191</sup> stating that:

Where there is actually no contract, the promissory estoppel may be invoked, thereby supplying a remedy which will enable the injured party to be compensated for his foreseeable, definite and substantial reliance,<sup>192</sup> and where the promisee has failed to bind the promisor to a legally sufficient contract, but where the promisee has acted in reliance upon a promise to his detriment, the promisee is to be allowed to recover no more than reliance damages measured by the detriment sustained.<sup>193</sup>

Thus, the function of estoppel in the above case was not to supply the missing elements of a contract, but merely to compensate the relying party to the extent of his reliance loss. So too, in a civil law jurisdiction, the argument could possibly be made that where a party to a promise has taken certain steps in preparation for a prospective agreement, he may recover damages on the basis of detrimental reliance if he can prove that his reliance was reasonable and justifiable in light of the surrounding circumstances. Such a result does not contradict the rules regulating the promise of contract, nor will it bestow upon a party an action for specific performance.

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<sup>191</sup>*Id.* at 97.

<sup>192</sup>*Id.*

<sup>193</sup>*Id.*

It must be noted, however, that the possible operation of promissory estoppel in the area of indefinite promises is less likely at civil law than common law. Civil law methodology depends on detailed supplementary regulation of contracts.<sup>194</sup> For instance, the Louisiana Civil Code specifies the elements of a perfect sale<sup>195</sup> or lease<sup>196</sup> and, unless otherwise agreed on by the parties, it will be presumed that the parties to the sale or lease agreements have subjected themselves to the supplementary provisions of the Code. For this reason, it has been observed<sup>197</sup> that there is less likelihood of indefiniteness in contract formation at civil law than at common law.

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<sup>194</sup>See Litvinoff, *Offer and Acceptance in Louisiana Law - A Comparative Analysis: Part II-Acceptance*, 38 LA. L. REV. 195 n. 206 (1968).

<sup>195</sup>LA. CIV. CODE art. 2456:

The sale is considered to be perfect between the parties, and the property is of right acquired to the purchaser with regard to the seller, as soon as there exists an agreement for the object and for the price thereof, although the object has not yet been delivered, nor the price paid.

LA. CIV. CODE art. 2464 provides detailed rules in regard to the essential elements of price:

The price of the sale must be certain, that is to say, fixed and determined by the parties.

It ought to consist of a sum of money, otherwise it would be considered as an exchange.

It ought to be serious, that is to say, there should have been a serious and true agreement that it should be paid.

It ought not to be out of all proportion with the value of the thing; for instance the sale of a plantation for a dollar could not be considered as a fair sale; it would be considered as a donation disguised.

Under LA. CIV. CODE art. 2465:

The price, however, may be left to the arbitration of a third person; but if such person can not, or be unwilling to make the estimation, there exists no sale.

<sup>196</sup>LA. CIV. CODE art. 2670 provides that:

To the contract of lease, as to that of sale, three things are absolutely necessary, to wit: the thing, the price, and the consent.

Article 2671 states that:

The price should be certain and determinate and should consist of money. However, it may consist in a certain quantity of commodities, or even in a portion of the fruits yielded by the thing leased.

Article 2672 also provides that:

The price, notwithstanding, may be left to the award of a third person named and determined, and then the contract includes the condition that this person shall fix the price; and if he can not or will not do it, there is no lease.

<sup>197</sup>See, Litvinoff, *supra* note 196.

#### (4) THE BINDING FORCE OF AN OFFER IN CIVIL LAW

##### (A) The Irrevocable Offer and Unilateral Declaration of Will as Sources of Obligation

Traditional common law does not give binding effect to a simple offer in the absence of consideration; an offeror has the right to withdraw his offer any time before acceptance.<sup>198</sup> Civil law, on the other hand, recognizes the "unilateral will"<sup>199</sup> as a source of obligations. A unilateral declaration of will may have binding effect whether or not something has been given in exchange for the declaration. As stated in article 1757 of the Louisiana Civil Code "obligations arise from contracts and other declarations of will ...."<sup>200</sup> A declaration of will, therefore, may give rise to an obligation even in the absence of a contract. This binding effect does not depend on mutual assent. Article 1944 of the Louisiana Civil Code provides an example of an offer that is binding on the basis of the unilateral will. It provides that "An offer of reward made to the public is binding upon the offeror even if the one who performs the requested act does not know of the offer."<sup>201</sup> Comment (a) explicitly states that this article "subjects the offeror of a reward to an obligation which is legal rather than contractual."<sup>202</sup> Consequently, the offer has a binding effect even though the party who performs the requested act does not know of the offer. "This result is predicated on the binding effect of a unilateral declaration of will."<sup>203</sup>

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<sup>198</sup>See, e.g., *McMillan v. Ames*, 33 Minn. 257, 22 N.W. 612, 613-614 (1885); *Bradford v. Foster*, 87 Tenn. 4, 9 S.W. 195 (1888); *O'Brien v. Boland*, 166 Mass. 481, 44 N.E. 602, 603 (1896); *Mueller v. Nortman*, 116 Wis. 468, 93 N.W. 538, 539 (1903); *Rease v. Kittle*, 56 W.Va. 269, 49 S.E. 150, 154 (1904); *Seyferth v. Groves & S.R.R. Co.*, 217 Ill. 483, 75 N.E. 522, 523 (1905); *Watkins v. Robertson*, 105 Va. 269, 54 S.E. 33, 38 (1906); *Soloman Mier Co. v. Hadden*, 148 Mich. 488, 111 N.W. 1040, 10421 (1907); *Marsh v. Lott*, 8 Cal. App. 384, 97 P. 163, 164 (1908); *Smith v. Cauthen*, 98 Miss. 746, 54 So. 844, 845 (1911); *Howe Scale Co. v. Wolfshaut*, 170 N.Y. 943, 944 (N. Y. Sup. Ct. 1918); *Womack v. Dalton Adding Mach. Sales Co.*, 285 S.W. 680 (Tex. Civ. App. 1926).

<sup>199</sup><sup>201</sup>. See generally, LITVINOFF, *supra* note 48, § 85, at 130. "Unilateral will" is to be distinguished from "unilateral contract," the latter term being used at common law to describe a promise calling for an acceptance in the form of an act rather than a return promise. It therefore specifies the type of consideration requested by the promisor, whereas "unilateral will" refers to the binding effect of the unilateral declaration of one's will, in the absence of mutual assent or consideration. *Id.*

<sup>200</sup>LA. CIV. CODE art. 1757.

<sup>201</sup>LA. CIV. CODE art. 1944.

<sup>202</sup>LA. CIV. CODE art. 1944 comment (a).

<sup>203</sup>LA. CIV. CODE art. 1944 comment (b).

An offer *per se* therefore may have binding effect at civil law. Under Louisiana Civil Code article 1928, "An offer that specifies a period of time for acceptance is irrevocable during that time."<sup>204</sup> Furthermore, "when the offer manifests an intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time."<sup>205</sup> A similar rule is stated in German Civil Code article 145, which provides that "Whoever offers to another to enter a contract is bound by the offer, unless he has excluded being so bound."<sup>206</sup> The Italian Civil Code provides that "An offer may be revoked until the contract is formed ...,"<sup>207</sup> but "If the offeror has bound himself to keep the offer open for a certain time the revocation is without effect."<sup>208</sup> The irrevocability of an offer is also provided for in the Civil Code of the Republic of China, which provides that "A person who offers to make a contract is bound by his offer unless at the time of offer he excludes this obligation or unless it may be presumed from the circumstances or from the nature of the affair that he did not intend to be bound ...."<sup>209</sup>

As seen from the above articles, the irrevocability of the offer need not be predicated on an agreement between the offeror and the offeree to keep the offer open. Consequently, an irrevocable offer under article 1928 of the Louisiana Civil Code is distinguishable from an option contract which, as stated by article 1933 of the Code, is "a contract whereby the parties agree that the offeror is bound by his offer for a specified period of time and that the offeree may accept within that time."<sup>210</sup> A corollary is that liability for unlawful or improper revocation of an offer

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<sup>204</sup>LA. CIV. CODE art. 1528.

<sup>205</sup>*Id.*

<sup>206</sup>German Civ. Code art. 145.

<sup>207</sup>Italian Civ. Code art. 1328.

<sup>208</sup>Italian Civ. Code art. 1329.

<sup>209</sup>Chinese Civ. Code art. 154.

<sup>210</sup>LA. CIV. CODE art. 1933, Comment (b), states that:

An option is a veritable contract that may be assigned and that gives rise to rights and obligations that devolve upon the parties' heirs when not personal to the parties. An irrevocable offer is not assignable, and ... it expires at the death of either the offeror or the offeree.

However, comment (c) explains that:

The offer contained in an option contract expires upon the death or incapacity of the grantor if the circumstances show that that offer, if accepted, would have given rise to an obligation personal to the grantor; it expires upon the death or incapacity of the grantee if the obligation arising from the proposed contract would have been personal to the grantee. It expires upon the death or incapacity of either if the circumstances show that the proposed obligation would have been personal to both.



under article 1928 is presumably non-contractual, while under article 1933 liability for the breach of an option contract is based upon the contract itself. It has been argued, however, that "when the revocation is unlawful, the one who accepted the offer timely has an action on the contract. The offeror's obligation, born as a legal one, is replaced by a contractual obligation upon the other party's timely consent ...."<sup>211</sup>

This theory, however, does not provide an answer to cases in which the offeror withdrew his offer before the expiration of the specified time for acceptance or without allowing a reasonable time for acceptance. Liability for the unlawful revocation of an offer may be more properly predicated on the basis of delictual liability within article 2315 of the Code.<sup>212</sup> Establishing delictual liability in such a case is more consistent with the basis of the obligation of an offeror, which is legal rather than contractual. Imposing liability for unlawful revocation also provides a ground for liability where an offeree, at the urging of the offeror had taken certain steps to his detriment in anticipation of the contract, although he did not yet technically accept the offer.

### (B) The Concept of Unilateral Contract: Civil Law Analysis of Construction Bidding Cases

Bilateral and unilateral also have different meanings in civil law than at common law. A bilateral contract at common law refers to a contract in which the promisor requests a return promise, while in a unilateral contract the promisor seeks an act on the part of the other party.<sup>213</sup> The distinction between the two types of contracts signals the type of acceptance sought by the promisor, i.e., a promise or a performance; in essence, this distinction operates in the area of formation of contract.

At civil law, the same terms are used, but in a different setting. A contract is unilateral "when the party who accepts the obligation of the

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<sup>211</sup>Litvinoff, *Offer and Acceptance in Louisiana Law — A Comparative Analysis: Part I—Offer*, 28 LA. L. REV. 1, 68 (1967).

<sup>212</sup>See, Palmer, *The Misinterpretation of Article 1801*, 46 TUL. L. REV. 859, 872 (1972); see generally, Comment, *Duration and Revocability of an Offer*, 1 LA. L. REV. 182 (1938); Oliphant, *The Duration and Termination of an Offer*, 18 MICH. L. REV. 201 (1920).

<sup>213</sup>See generally, Yankowitz, *Acceptance by Performance When the Offeror Demands a Promise*, 52 S. CAL. L. REV. 1917 (1979); Murray, *Contracts: A New Design for the Agreement Process*, 53 CORNELL L. REV. 785 (1968); Comment, *The Offer of an Act for A Promise*, 29 YALE L.J. 767 (1920); Ashley, *Offers Calling for a Consideration Other Than a Counter Promise*, 23 HARV. L. REV. 159 (1910).

other does not assume a reciprocal obligation,"<sup>214</sup> and is bilateral or synallagmatic "when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other."<sup>215</sup> The distinction between unilateral and bilateral contracts at civil law identifies the kind of obligation which arises upon a contract already accepted. It operates not in contract formation but in determining the classification of a contract.<sup>216</sup>

As a matter of principle, revocation of an offer before complete performance in civil law does not raise the problems common law lawyers experience in similar circumstances when a promisee revokes an offer for a unilateral contract. Traditional common law insisted on complete performance before a unilateral contract might have any legal effect. It did not resolve the hard cases; as a result, the offeree was left without remedy even when he suffered detriment by attempting to comply with the offer.<sup>217</sup> Under the civil law, an offer calling for acceptance by performance amounts to a bilateral, not a unilateral, contract because it gives rise to an obligation on the part of both the offeror and offeree.

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<sup>214</sup>LA. CIV. CODE art. 1907.

<sup>215</sup>LA. CIV. CODE art. 1908.

<sup>216</sup>See, LITVINOFF, *supra* note 48, § 97, at 153-160. See generally, Comment, *The Unilateral Contract In The Civil Law And In Louisiana*, 16 TUL. L. REV. 456 (1942); Carter, *The Breach of Unilateral Contracts*, 11 ANGLO-AM. 169 (1982).

<sup>217</sup>See, e.g., *Biggers v. Owen*, 79 Ga. 658, 5 S.E. 193, 193 (1888); *Smith v. Canthen*, 98 Miss. 746, 54 So. 844, 845 (1911); *Elliott v. Kazajain*, 255 Mass. 459, 152 N.E. 351, 353 (1926); *Wallace v. Norther Ohio Traction & Light Co.*, 57 Ohio App. 203, 13 N.E.2d 139, 143 (1937); *Northampton Inst. for Sav. v. Putnam*, 313 Mass. 1, 45 N.E.2d 936, 939 (1943).

Williston, defending the rule, writes:

On principle it is hard to see why the offeror may not thus revoke his offer. He cannot be said to have already contracted, because of terms of his offer he was only to be bound if something was done, and it has not yet been done, though it has been begun. Moreover, it may never be done, for the promisee has made no promise to complete the act, and may cease performance at his pleasure. To deny the offeror the right to revoke is, therefore, in effect to hold the promise of one contracting party binding though the other party is neither bound to perform nor has actually performed the requested consideration.

It seems difficult in theory successfully to question the power of one who offers to enter into a bilateral contract to withdraw his offer at any time until performance has been completed by the offeree .... To say that the beginning of [performance] by [the offeree] amounts to an assent binding on both [the offeror and the offeree] ... is to change the hypothesis that [the offeror] offered not to make a bilateral contract but a unilateral one ... and in effect to deny the right of the offeror to dictate the terms of his offer.

1 WILLISTON, *CONTRACTS* sec. 60 (rev. ed. 1957).

Commencement of performance signals the acceptance of the contract<sup>218</sup> unless the parties contemplated that the offer can be accepted only by complete performance, in which case the offeror must give the performing offeree reasonable time to complete the performance.<sup>219</sup>

The differing effects of contract formation between the two systems is exemplified in cases of construction bidding. Both systems protect the general contractor who relies on a bid submitted by a subcontractor in making his own bid, only to have the subcontractor withdraw after his lower bid has been accepted and used in the final bid. Promissory estoppel has been applied by American courts to prevent the subcontractor from claiming the right to revoke his offer.<sup>220</sup> This line of cases started with the famous decision of Judge Traynor in *Drennan v. Star Paving Co.*<sup>221</sup> Absence of consideration, Traynor declared, "is not

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<sup>218</sup>LA. CIV. CODE art. 1939 provides that: "[W]hen an offeror invites an offeree to accept by performance and, according to usage or the nature or the terms of the contract, it is contemplated that the performance will be completed if commenced, a contract is formed when the offeree begins the requested performance." Similarly, article 1327 of the Italian Civil Code states that: "When, at the request of the offeror or by the nature of the transaction or according to usage, the performance should take place without a prior reply, the contract is concluded at the time and place in which performance begins."

The offeree, however, may be under a duty to give the offeror a notice of commencement of performance. Article 1941 of the Louisiana Civil Code states that: "[W]hen commencement of the performance either constitutes acceptance or makes the offer irrevocable, the offeree must give prompt notice of that commencement unless the offeror knows or should know that the offeree has begun to perform. An offeree who fails to give the notice is liable for damages."

<sup>219</sup>LA. CIVIL CODE art. 1940:

When, according to usage or the nature of the contract, or its own terms, an offer made to a particular offeree can be accepted only by rendering a completed performance, the offeror cannot revoke the offer, once the offeree has begun to perform, for the reasonable time necessary to complete the performance. The offeree, however, is not bound to complete the performance he has begun.

The offeror's duty of performance is conditional on completion or tender of the requested performance.

<sup>220</sup>*See, e.g.,* Finney Co., Inc. v. Monarch Const. Co., Inc. 670 S.W.2d 857 (Ky. 1984); Powers Const. Co. v. Salem Carpets, Inc., 322 S.E.2d 30 (S.C. App. 1984); Tolboe Const. Co. v. Staker Paving & Const. Co., 682 P.2d 843 (Utah 1984); Alaska Bussell Elec. v. Vern Hickel Const., 688 P.2d 576 (Alaska 1984); John Price Associates, Inc. v. Warner Elec., Inc., 723 F.2d 755 (10th Cir. 1983); Gerson Elec. Const. Co. v. Honeywell, Inc., 117 Ill. App.3d 308, 453 N.E.2d 726 (1983); Allen M. Campbell Co., Gen. Const. v. Va. Metal Ind., 708 F.2d 930 (4th Cir. 1983).

<sup>221</sup>51 Cal.2d 409, 333 P.2d 757 (1958). For discussion of the case and its impact on the law of promissory estoppel, *see generally* Closen & Weiland, *The Construction Industry Bidding Cases: Application of Traditional Contract, Promissory Estoppel, and Other Theories of the Relations Between General Contractors and Subcontractors*, 13 J. MAR.L.R. 565, 568-578 (1980); Lewis, *Contracts Between Businessmen: Reform of the Law of Firm Offers and an Empirical Study of Tendering Prac-*

fatal to the enforcement of such a promise ... [because] reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding."<sup>222</sup> The Second Restatement of Contracts paraphrases the *Drennan* rule in section 87(2), which provides:

An offer which the offerer should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree, before acceptance, and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.<sup>223</sup>

It should be noted that, at common law, strict contractual analysis of the construction bidding process would fail to protect the general contractor adequately since an offer unsupported by consideration is revocable at any time before acceptance and reliance by the general contractor on the subcontractor's bid does not constitute the bargained-for performance which ordinarily is required for a binding contract.<sup>224</sup>

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*tices in the Building Industry*, 9 J.L. & SOC'Y. 153 (1982) (discussing British practices); Marshall, *The Applicability of the Uniform Commercial Code to Construction Contracts*, 28 EMORY L.J. 335 (1979); Comment, *Bid Shopping and Peddling in the Subcontract Construction Industry*, 218 U.C.L.A. L. REV. 389 (1970); Note, *The "Firm Offer" Problem in Construction Bids and the Need for Promissory Estoppel*, 10 WM. & MARY L. REV. 212 (1968); Grimes & Walker, *Unilateral Mistakes in Construction Bids: Methods of Proof and Theories of Recovery - A Modern Approach*, 5 B.C. IND. & COM. L. REV. 213 (1964); Keye, *Consideration Reconsidered - The Problems of the Withdrawn Bid*, 10 STAN. L. REV. 441 (1958); Schultz, *The Firm Offer Puzzle: A Study of Business Practice in the Construction Industry*, 19 U. CHI. L. REV. 237 (1952).

<sup>222</sup>51 Cal.2d at 414, 333 P.2d at 760 (1958).

<sup>223</sup>RESTATEMENT (SECOND) OF CONTRACTS § 87 (1982). On cases citing Section 87(2), see, e.g., *Ferrer v. Taft Structurals, Inc.*, 21 Wash. App. 832, 587 P.2d 177, 178-179 (1978) (Section 87(2) applies where "a subcontractor submits a bid to the general contractor, knowing the general [contractor] cannot accept the bid as an offer immediately, but must first incorporate it into the general's offer to the prospective employer. The general contractor incorporates the bid in reliance upon the subcontractor to perform as promised, should the prospective employer accept the general's offer. Thus the elements of predictable and justifiable reliance and change of position are satisfied ... . [A] subcontractor's bid upon which a general contractor relies should be deemed irrevocable for a reasonable time pursuant to the doctrine of promissory estoppel."); *David J. Tierney Jr., Inc. v. T. Wellington Carpets Inc.*, 392 N.E.2d 1066, 1068 (Mass. App. Ct. 1979) ("The jury could have found that [the subcontractor's] offer had not been revoked, that [the general contractor] relied upon it in submitting its bid for the general contract, and that [the subcontractor] was thereby bound."). See also, *Cannavino & Shea, Inc. v. Water Works Supply Corp.*, 361 Mass. 363, 366, 280 N.E.2d 147, 149 (1972).

<sup>224</sup>In the famous case of *Klose v. Sequoia Union High School Dist.*, the court expressed this view, stating that "A subcontractor bidder merely makes an offer that is converted into a contract by ... acceptance conveyed ... by the general contractor. No contractual relationship is created ... even though the bid is used as part of the ...

Subcontracting cases are treated differently in civil law. Under the irrevocable offer rule, a subcontractor's bid may not be withdrawn early without the offeree's consent if the subcontractor specified a period of time for acceptance. The subcontractor's offer may be irrevocable even in the absence of an express term, for it is said that by submitting his bid the subcontractor "manifests an intent to give the [general contractor] a delay within which to accept ...."<sup>225</sup>

By the nature of the contract and the custom of the construction industry, a general contractor must review and compare sub-bids before offering the job to the lowest bidder. Binding effect is given the subcontractor's offer at the moment it is made because the general contractor must be given a reasonable time to make such decisions.

Use by the general contractor of the subcontractor's bid constitutes acceptance and perfects the contract. The contract, however, is conditioned upon the owner's acceptance of the main bid. In other words, the obligations of the subcontractor and the general contractor arise from the moment the bid is used by the general contractor; these obligations, however, are subject to a condition which, if not fulfilled, dissolves the contract. Parenthetically, it might be noted that since the subcontractor's offer is irrevocable, its acceptance by the general contractor is only effective when notice is received by the subcontractor.<sup>226</sup>

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overall bid by the general contractor and accepted by the awarding authority." 118 Cal. App. 2d 636, 640-641, 258 P.2d 515, 517 (1953). Again in the recent case of *Mitchell v. Siqueiros*, the Court reemphasized that "[i]t is a settled common law contract principle that utilizing a subcontractor's bid in submitting the prime or general contract bid does not, without more, constitute an acceptance of the subcontractor's offer conditioned upon being awarded the general contract by the awarding authority." 99 Idaho 396, 399, 582 P.2d 1074, 1077 (1978).

<sup>225</sup>LA. CIV. CODE art. 1928.

<sup>226</sup>This is an application of LA. CIV. CODE art. 1934 which provides that "[a]n acceptance of an irrevocable offer is effective when received by the offeror." The rule is different in cases of acceptance of a revocable offer. As to the latter, article 1935 states that "Unless otherwise specified by the offer or the law, an acceptance of a revocable offer, made in a manner and by a medium suggested by the offer or in a reasonable manner and by a reasonable medium, is effective when transmitted by the offeree." The difference in treatment, based upon whether the offer is irrevocable or revocable, is explained in Comment (b) to LA. CIV. CODE art. 1935 which states that:

When an offer is revocable ..., the offeree's position is fragile because the offer may be effectively revoked any time before he has accepted it. The famous "mailbox rule" or rule of acceptance upon dispatch, as formulated in *Adams v. Lindsell*, In Re King's Bench, 1 Barn & Ad. 681 (1818), affords protection to an offeree in such a position by allowing him to rely upon a contract being formed when he transmits his acceptance. The risk of transmission is placed on the offeror. Comparative research in this area shows that

In the case of *Harris v. Lillis*,<sup>227</sup> a general contractor incorporated a subcontractor's bid into his own bid, then mailed a written acceptance to the subcontractor. Upon discovering a mistake, the subcontractor attempted to revoke his bid. The court held the subcontractor was bound from the moment the general contractor accepted the subbid; therefore, any subsequent revocation was ineffective. The court went on to say that, according to customs prevailing in the New Orleans construction industry, "an offer by a subcontractor to a general contractor to do work is irrevocable after the contractor has used the estimate of the subcontractor as a basis for his offer to the owner and the owner has accepted the general contractor's bid."<sup>228</sup>

It has been pointed out<sup>229</sup> that the dictum in *Harris* referring to the custom of the construction industry was unnecessary for the court's holding since, under general rules of offer and acceptance, revocation after timely acceptance is without effect. Moreover, the dictum seems to indicate that irrevocability of the offer depends on the use of the bid by the general contractor. In fact an offer is irrevocable at the moment of its making: the subcontractor cannot revoke his offer unless the general contractor has been given reasonable time to accept. Therefore, the custom of the construction industry may only be relevant as a factor in determining what constitutes a reasonable time<sup>230</sup> while the rules of offer

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in the various systems of law the revocability of offers and the time of formation of contracts are governed by reciprocally complementary rules. Thus, where an ordinary offer is irrevocable for some period of time, as is generally the case in continental systems, acceptance is only effective upon receipt by the offeror; but where an offer is revocable, as is generally the case at the common law, the acceptance is effective upon transmission ....

See generally, Nussbaum, *Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine*, 36 COLUM. L. REV. 920 (1936); Miazza, *Contracts by Correspondence in Anglo-American, French and Louisiana Law*, 9 TUL. L. REV. 590 (1935); Litvinoff, *Offer and Acceptance in Louisiana Law: A Comparative Analysis: Part II - Acceptance*, 28 LA. L. REV. 153 (1968).

<sup>227</sup>24 So.2d 689 (La. App. Or. Cir. 1946).

<sup>228</sup>*Id.* at 691.

<sup>229</sup>See Litvinoff, *supra* note 213, at 57.

<sup>230</sup>See, e.g., *Metal Building Products Co. v. Fidelity & Deposit Co. of Maryland*, 144 So.2d 751, 755 (La. App. Ct. 4th Cir. 1962) ("There was a binding agreement between the Construction Company and the subcontractors. The evidence given by several general contractors preponderates that it is a well-known custom and practice in the trade that a subcontractor's bid continues unless withdrawn upon reasonable notice before the general contractor is awarded the contract. In this case the subcontractors' bids were specifically accepted and they were given purchase orders all without question or protest."); *Claitor v. Delta Corporation of Baton Rouge, Inc.*, 279 So.2d 731, 733 (La. Ct. App. 1st Cir. 1973) ("In the bid submitted by the defendant, it was a specific intent to provide thirty days from the bid opening in which the offer would

and acceptance establish a binding relationship between the general contractor and the subcontractor, and adequately protect the parties to the construction bidding process.<sup>231</sup>

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remain open and during which the petitioner would have the opportunity of accepting same. During this period of time the offer was irrevocable."); *W.M. Heroman & Co. Inc. v. Saia Electric, Inc.*, 346 So.2d 827, 830 (La. Ct. App. 1st Cir.), writ denied, 349 So.2d 1271 (La. 1977) ("The subcontractor's offer to [the general contractor] was irrevocable until such bid by the general contractor to the owner had been declined or the project had been abandoned, provided an unreasonable time had not elapsed ...." "While the record reflects that three months did elapse before the contract was let, considering the substantial nature of the undertaking and ... that ... the project was proceeding toward realization, the Court determines that an unreasonable time did not elapse and the defendant is bound by its offer.").

<sup>231</sup>See *Albert v. Farnsworth*, 176 F.2d 198, 201 (5th Cir. 1949) in which the court refused to adopt the contract-by-custom analysis used by the *Harris v. Lillis* court. The Fifth Circuit also stated that:

This is not to say, though, that on another trial, proof of a custom or practice would not be relevant in determining ... whether the proposition was made "in terms, which evince a design to give the other party the right of concluding the contract by his assent," and whether that assent was "given within such time as the situation of the parties and the nature of the contract shall prove that it was the intention of the proposer to allow", or ... that the offer was made "allowing such reasonable time as from the terms of his offer he has given, or from the circumstances of the case he may be supposed to have intended to give to the party, to communicate his determination."

*Id.* at 203 (quoting LA. CIV. CODE arts. 1802, 1809 (1870)). American courts are reluctant to permit the introduction of trade usage and custom for the purpose of proving the existence of a contract. In *Corbin-Dyke Electric Company v. Burr*, for instance, the subcontractor brought an action to recover damages following the general contractor's award of the subcontract to another subcontractor, although the subcontractor's bid was the lowest. The subcontractor argued that, according to custom and usage in trade, a subcontractor who is listed in the general contractor's bid will receive the subcontract if the subcontractor's bid was the lowest and the general contractor has been successful in obtaining the prime contract from the awarding authority. The Court stated that evidence of custom and trade usage "is admissible only where an existing agreement between the parties is ambiguous, to show what the parties intended by their agreement." 18 Ariz. App. 101, 103, 500 P.2d 632, 634 (1972). The Court further explained: "Primarily this is limited to proving the meaning of words or phrases used in the agreement." *Id.* "[S]uch custom and usage evidence cannot be used to initially establish acceptance or the manifestation of mutual assent." *Id.* See also, *Plumbing Shop, Inc. v. Pitts*, 67 Wash., 2d 514, 521, 408 P.2d 382, 386 (1965) ("The alleged implied-in-fact contract ... is complete only in one sense: the agreed upon price. To imply the remaining essentials by way of custom and usage would violate the elementary principle that the court will not make a contract for the parties"); *Milone & Tucci, Inc. v. Bona Fide Builders, Inc.*, 49 Wash., 2d 363, 367, 301 P.2d 759, 761 (1956) ("The effect of custom or usage upon contractual obligations is dependent upon the existence of an actual contract between the parties. Where there is no contract, proof of usage and custom will not make one."). But see, *Industrial Electric-Seattle, Inc. v. Bosko*, 410 P.2d 10, 18 (Wash. 1966) (Evidence of custom and usage is admissible where "there [is] considerable evidence of a series of communications between the parties which [result] in some understanding or agreement, in addition to the use of the figures supplied by [the subcontractor] ..."). On the scope of contractual obligations as affected by usage of trade and course of dealing, see RESTATEMENT (SECOND) OF CONTRACTS ss 219-223 (1982).

### (C) Offer-Acceptance and Detrimental Reliance: Two Different Approaches to Contract Formation

Civilian analysis of contract formation focuses on the presence or absence of offer and acceptance. Whether the offer is revocable or irrevocable, whether such irrevocability is for a stated period of time or a reasonable time as a result of the circumstances of the case, and whether there is timely acceptance of that offer, are the relevant questions to be addressed in a contract formation case.

The famous case of *Ever-Tite Roofing Corp. v. Green*<sup>232</sup> best illustrates civilian methodology in this area. In *Ever-Tite* defendants wanted plaintiff to re-roof their residence. They executed and signed an instrument stating that "This agreement shall become binding only upon written acceptance hereof, by the principal or authorized officer of the contractor, or upon commencing performance of the work ...."<sup>233</sup> To extend credit to the homeowner, plaintiff needed credit approval from a lending institution, and defendants knew that this would entail a delay. The day after receiving defendants' offer, plaintiff initiated the credit check. Nine days later, defendants' credit was approved. The following day plaintiff loaded two trucks with the necessary materials and sent his workmen to do the job. Plaintiff's employees were notified upon arrival at defendants' residence, that the offer was revoked. Other workmen had already started the re-roofing job. Finding for plaintiff, the court held that plaintiff had the right to accept the offer within a reasonable time "since the contract did not specify the time within which it was to be accepted or within which the work was to have been commenced."<sup>234</sup> The court found that plaintiff had in fact accepted the offer: "commencement began with the loading of the trucks with the necessary materials ... and transporting such materials and the workmen to defendant's residence."<sup>235</sup> The court also stated that "actual commencement or performance of the work ... began before any notice of dissent by defendants was given plaintiff. The proposition and its acceptance thus became a completed contract."<sup>236</sup> Plaintiff was awarded full contract damages including the profit he would have derived from the contract.

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<sup>232</sup>83 So.2d 449 (La. Ct. App. 2d Cir. 1955).

<sup>233</sup>*Id.* at 450.

<sup>234</sup>*Id.* at 452.

<sup>235</sup>*Id.*

<sup>236</sup>*Id.*



One might question whether any contractual liability should have been established. The offer stipulated acceptance in either written form or by commencement of performance of the work. Strictly speaking, neither took place: plaintiff did not send defendants a written acceptance, and he never commenced performing the re-roofing work. Plaintiff's actions could more properly be characterized as preparatory. Awarding expectation damages would therefore seem inappropriate. Still, this is not to suggest that plaintiff should have been left without a remedy: because the offer was irrevocable for a reasonable time, defendant's revocation of the offer was improper. As a result plaintiff should still have been awarded delictual damages equal to the losses incurred in preparation for the anticipated contract.

The common law detrimental reliance approach to problems, arising from the revocability of offers, could possibly have led to the more equitable result, but on a different basis. Although an offer like that in *Ever-Tite* is revocable at common law any time before acceptance, under the doctrine of promissory estoppel the offeree is entitled to reliance damages if he relied on the offer to his detriment and his reliance was foreseeable, reasonable, and justifiable. Preparatory actions-in-reliance on an offer are sufficient to trigger the application of promissory estoppel.<sup>237</sup> Hence, with promissory estoppel the offer-acceptance analysis is replaced by a more pragmatic approach that focuses on the reliance, which the offer may induce, and from there, to any detriment which may result from that reliance. This approach reflects the general trend at common law, which is more concerned with breach than with compliance.<sup>238</sup>

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<sup>237</sup>For illustrations of the application of promissory estoppel in cases of preparatory acts-in-reliance, see, e.g., *Grouse v. Group Health Plan, Inc.* 306 N.W.2d 114 (Minn. 1981), discussed *supra* notes 172-75; *Dunnam & Jeffrey, Inc., v. Cross Telecasting, Inc.* 7 Mich. App. 113, 118, 151 N.W.2d 194, 197 (1967) (Held: Plaintiff's complaint stated a cause of action under a promissory estoppel theory, having alleged that defendant's signed acceptance of plaintiff's letter outlining a future schedule of televised commercials made it foreseeable that plaintiff would rely on this promise in securing advertising clients and would be damaged if the station refused to air the commercials.). *But see* *Lazarus v. American Motors Corporation*, 21 Wis. 2d 76, 85, 123 N.W.2d 548, 553 (1963) ("The preparations which (plaintiff) made in order to enable him to perform did not give rise to a legal obligation even under the liberal application of the rule of substantial performance" and did not trigger the application of promissory estoppel).

<sup>238</sup>See generally LITVINOFF, *supra* note 48, § 58 at 83; Meeks, *Protection of the Reliance Interest in Contract Litigation: A Functional Model for Offer-Acceptance Analysis*, 25 LOY. L. REV. 308 (1979).

At civil law, the obligation of the offeror arises from the moment he makes his offer; a mere declaration of will, as previously indicated,<sup>239</sup> has a binding effect. Indeed it may be said that the effect of a unilateral declaration of will is to estop the person declaring his will from acting contrary to it.<sup>240</sup> This "estoppel-effect" is achieved in civil law at an early stage of contract formation, i.e., when the offer is made, while at common law it is the reliance on the offer rather than the offer itself which constitutes the basis of liability. It seems, therefore, that where no binding effect is given to an offer and the offeror is allowed to withdraw his offer before acceptance, the doctrine of detrimental reliance would protect the reliance interest of the offeree.

This is already the case with promises of public rewards. Under the German Civil Code, for instance, the promisor of a reward is presumed to waive his power of revocation if the promise specified a certain period of time for performance.<sup>241</sup> The Swiss law of obligations also recognizes the need for protecting reliance on such promises. It provides that a promisor who makes a promise to the public to pay a certain price in exchange for a service is bound to pay it in conformity with his promise. Under this article, the promisor has the right to withdraw his promise before the service is rendered, but he is bound to reimburse the promisee for the expenditures he incurred in good faith in reliance on the promise.<sup>242</sup> The Louisiana Civil Code is explicit in basing this remedy on the doctrine of detrimental reliance. Article 1945 provides that "An offer of reward made to the public may be revoked before completion of the requested act, provided the revocation is made by the same or an equally effective means as the offer."<sup>243</sup> Comment (c) further states that "If the offer is revoked under this article, the offeree may have a remedy under ... art. 1967," the latter article being based upon detrimental reliance.<sup>244</sup>

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<sup>239</sup>See *supra* notes 200-214 and accompanying text.

<sup>240</sup>See LITVINOFF, *supra* note 48, § 87 at 133.

<sup>241</sup>German Civ. Code art. 658.

<sup>242</sup>Swiss obligation law art. 8.

<sup>243</sup>LA. CIV. CODE art. 1945.

<sup>244</sup>LA. CIV. CODE art. 1945 comment c.

## (5) THE FUTURE OF DETRIMENTAL RELIANCE IN CIVIL LAW

### (A) Detrimental Reliance: The Code and the Restatement

Article 1967 of the Louisiana Civil Code, entitled "Cause Defined; Detrimental Reliance," provides that:

Cause is the reason why a party obligates himself. A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.<sup>245</sup>

Apparently, the drafters of the code were influenced by the Restaters in formulating Louisiana's provisions on detrimental reliance. Section 90 of the Second Restatement of Contracts provides that:

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 such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.<sup>246</sup>

Nonetheless, it seems that the code drafters adopted a more restrictive approach to the doctrine. For example, detrimental reliance in Louisiana is limited by article 1967 to cases where the promisor "knew or should have known that the promise would induce" reliance. In other words, the promisor must have actual or constructive knowledge of the acts done in reliance. Under Section 90 of the Restatement, which is followed by almost all jurisdictions in the United States, a foreseeability test is applied whereby it is enough to prove that the promisor made a promise reasonably expected to induce reliance.<sup>247</sup> Furthermore, the

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<sup>245</sup>LA. CIV. CODE art. 1967.

<sup>246</sup>Restatement (Second) of Contracts § 90 (1981).

<sup>247</sup>*See, e.g.*, Kirkpatrick v. Seneca National Bank, 213 Kan. 61, 63, 515 P.2d 781, 787 (1973); Christenson v. Minneapolis Municipal Employees Retirement Board, 331 N.W.2d 740, 749 (Minn. 1983); Northwestern Bank of Commerce v. Employers'

Code prescribes which parties are entitled to claim in a detrimental reliance action. Only "the other party" to whom the promise is addressed is allowed to recover under the doctrine. In contrast, the Second Restatement of Contracts extends this remedy to any third party who can prove the prerequisites of detrimental reliance liability.<sup>248</sup>

The Louisiana Civil Code, however, does follow the Second Restatement of Contracts by adopting a flexible approach to what remedies may be awarded on the basis of detrimental reliance. Under article 1967 of the Code, recovery may be discretionarily limited to "the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise."<sup>249</sup> Thus, while article 1995 provides the general rule that "Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived,"<sup>250</sup> article 1967 offers a more flexible approach in that "the court may grant damages rather than specific performance to the disappointed promisee and may even limit damages thus granted to the expenses actually incurred. The court, in other words, need not necessarily grant the promisee both elements of damages specified in ... art. 1995."<sup>251</sup>

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Life Ins. Co. of America, 281 N.W.2d 164 (Minn. 1979); *Clark v. Coats & Suits Unlimited*, 135 Mich. App. 87, 352 N.W.2d 349, 354 (1984); *Minor v. Sully Butte School District*, 345 N.W.2d 48, 51 (S.D. 1984).

<sup>248</sup>On cases following the Restatement's position *see, e.g.*, *Burgess v. California Mutual Bldg. & Loan Assn.*, 210 Cal. 180, 290 P. 1029 (1930); *Hoffman v. Red Owl Stores, Inc.* 26 Wis. 2d 683, 133 N.W.2d 267 (1965); *Aronowicz v. Nalley's Inc.*, 30 Cal. App. 3d 27, 106 Cal. Rptr. 424 (1973); *Silberman v. Roethe*, 64 Wis., 2d 131, 218 N.W.2d 723 (1974).

<sup>249</sup>LA. CIV. CODE art. 1967.

<sup>250</sup>LA. CIV. CODE art. 1995.

<sup>251</sup>LA. CIV. CODE art. 1967, comment (e). This judicial discretion in awarding remedies is also provided for in LA. CIV. CODE art. 1999 which states: "[w]hen damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages."

It must be noted that the approach to specific performance is different in the two systems. At civil law, an obligee has a right to specific performance, which is awarded to a plaintiff as long as the performance of the obligation is still possible. Article 1986 codifies these principles, stating that: "Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee."

At common law, it is the court's discretion which determines whether a plaintiff is entitled to specific performance. Moreover, specific performance is an equitable remedy which is awarded only if damages prove to be inadequate. See *Litvinoff*, *supra* note 48, § 170 at 319.

### **(B) Reasonableness of Reliance on a Gratuitous Promise Made Without the Required Formalities**

One further restriction on the scope of detrimental reliance liability under article 1967 appears in the last sentence of the article: "Reliance on a gratuitous promise made without required formalities is not reasonable." Comment (f) further explains that "a party should place no reliance on his belief that he has entered a gratuitous contract when some formality prescribed for the validity of such a contract has been omitted. Thus, reliance on a gratuitous donation not made in authentic form is not reasonable."<sup>252</sup>

Article 1967 excludes the doctrine of detrimental reliance from the area of gratuitous promises in the absence of required form. As indicated, promissory estoppel proved to be a useful device for enforcing gratuitous promises in American law.<sup>253</sup> Civilians, on the other hand, may see promissory estoppel as an unnecessary device in a civil law system. The argument may be made that promissory estoppel originated as a consideration substitute and, since the doctrine of consideration does not exist in civil law and the analogous doctrine of cause provides a broader ground for enforceability, promissory estoppel serves no useful end in civil law.<sup>254</sup> It has been suggested earlier that this proposition is untrue and that detrimental reliance may provide an alternative basis of liability in cases of charitable subscriptions and other gratuitous promises made without the required formalities.<sup>255</sup> While it is true that promissory estoppel was invented in American law as a species of consideration, today the doctrine goes beyond this traditional role to provide a basis of liability in cases in which consideration is not at issue.<sup>256</sup>

*Simmons v. Sowela Technical Institute*,<sup>257</sup> the only case to the present writer's knowledge which cites Louisiana Civil Code article 1967, illustrates the inequitable results which may follow from not using detrimental reliance in cases of informal gratuitous promises. In this case, plaintiff was dismissed from a nursing institute after she had completed 11 of the 12 months required for obtaining a nursing degree. The

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<sup>252</sup>LA. CIV. CODE art. 1967, comment (f).

<sup>253</sup>See, *supra* note 99 and accompanying text.

<sup>254</sup>See, *supra* notes 39-41 and accompanying text.

<sup>255</sup>See, *supra* notes 82-102 and accompanying text.

<sup>256</sup>See, *supra* notes 112-246 and accompanying text.

<sup>257</sup>470 So.2d 913 (La. Ct. App. 3d Cir. 1985).

dismissal resulted from a violation of ethical conduct. The decision was subject to re-evaluation, and re-admission might have been possible the following semester.

Due to administrative delays, it was almost four years before plaintiff was authorized to reenter the program. Plaintiff filed a suit for alleged breach of contract and negligence; the negligence action, however, had prescribed. As to the contract claim, the trial court found that the defendant had breached an implied bilateral contract: plaintiff obligated herself to pay all required fees, maintain the prescribed level of academic achievement, and observe the school disciplinary regulations; in return, the school obligated itself to award plaintiff a diploma upon successful completion of the course of study. The trial court awarded plaintiff \$21,000 in damages.

The Institute appealed. The Court of Appeal held that the trial court erred in finding a bilateral contract since plaintiff was not required to pay any fees to attend the program, was under no civil obligation to maintain a certain level of academic achievement or observe the school disciplinary regulations, and was free to quit at any time. The court stated that the contract lacked any reciprocal obligations and was instead a unilateral contract of a gratuitous nature, binding only if made and accepted by an act passed before a notary public and two witnesses. This contract, however, did not comply with this requirement. The court recognized that detrimental reliance might constitute an alternative basis of liability under article 1967 of the code, but refused to apply the article because plaintiff had relied upon a gratuitous promise made without the required formalities, and therefore her reliance was unreasonable. It remarked that the doctrine of detrimental reliance has been applied in Louisiana in two types of cases: reciprocal agreements which for some reason were unenforceable,<sup>258</sup> and cases in which public policy dictated the protection of certain types of promises.<sup>259</sup> Relying upon article

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<sup>258</sup>*Id.* at 923 (citing *Brunt v. Standard Life Insurance Co.*, 259 So.2d 575 (La. Ct. App. 1st Cir. 1972); *Continental Casualty Co. v. Associated Pipe & Supply Co.*, 447 F.2d 1041 (5th Cir. 1971); *Johnson v. Capital City Ford Co.*, 85 So.2d 75 (La. Ct. App. 1st Cir. 1955); *Ever-Tite Roofing Corp. v. Green*, 83 So.2d 449 (La. Ct. App. 2d Cir. 1955); *Robinson v. Standard Oil Co. of Louisiana*, 180 So. 237 (La. Ct. App. 1st Cir. 1938).

<sup>259</sup>*Id.* (citing *W.M. Heroman & Co. v. Saia Electric, Inc.*, 346 So.2d 827 (La. Ct. App. 1st Cir.), writ denied, 349 So.2d 1271 (La. 1977); *Southern Discount Co. v. Williams*, 226 So.2d 60 (La. Ct. App. 4th Cir. 1969); *Baptist Hospital v. Cappel*, 129 So. 425 (La. Ct. App. 2d Cir. 1930); *Succession of Gesselly*, 216 La. 731, 44 So.2d 838 (1950)).

1967, the court concluded, "we shall not extend the doctrine of detrimental reliance to afford recovery when the plaintiff's reliance is based on a donation that requires the formalities of authentic form."<sup>260</sup>

Apparently the code drafters intended to preserve the solemnity of the authentic act for donations<sup>261</sup> in the contract-making process.<sup>262</sup> It is here submitted, however, that compensation for detrimental reliance does not circumvent the requirement of form. Few recent American cases would suggest that the Statute of Frauds, as a contract-based defense, is a bar to recovery in a promissory estoppel case. As one court put it, "a statute of frauds relates to the enforceability of contracts; promissory estoppel relates to promises which have no contractual basis and are enforced only when necessary to avoid injustice."<sup>263</sup>

Use of promissory estoppel as an independent basis of liability obviates the inquiry into the legislative policy behind the form requirement and would encourage courts to enforce a promise, if justice requires, without being troubled by the claim that enforcement abrogates the form requirement. One may further argue that damages awarded on the basis of promissory estoppel should be limited to the extent of the promisee's reliance,<sup>264</sup> for limiting the award to reliance damages is consistent with the underlying rationale and function of enforcing promises with no contractual basis only to the extent necessary to avoid injustice.

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<sup>260</sup>*Id.*

<sup>261</sup>See Comment, *Detrimental Reliance*, 45 LA. L. REV. 753, 765 (1985).

<sup>262</sup>For an extensive discussion of the functions of form, see Perillo, *The Statute of Frauds in the Light of the Functions and Dysfunctions of Form*, 43 FORDHAM L. REV. 39 (1974); Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941).

<sup>263</sup>*Janke Construction Co. v. Vulcan Materials, Co.*, 386 F.Supp. 687, 697 (W.D. Wis. 1974), *aff'd.*, 527 F.2d 772 (7th Cir. 1976). See also, *N. Litterio & Co. v. Glassman Construction Co.*, 319 F.2d 736, 740 (D.C. Cir. 1963) ("The issue as to the applicability of the Statute of Frauds is no longer germane in light of our holding that no contract was created."); *R.S. Bennett & Co. v. Economy Mechanical Indus., Inc.*, 606 F.2d 182, 188-189 (7th Cir. 1979)("[T]he Illinois Supreme Court would no longer consider the statute of frauds as a complete bar to recovery on an estoppel theory .... The promise alone is sufficient basis for estoppel, regardless of the statute of frauds ....").

<sup>264</sup>For cases limiting promissory estoppel relief to reliance damages, see, e.g., *Telephone Associates v. St. Louis County B. D.*, 364 N.W.2d 378, 383 (Minn. 1985); *Minor v. Sully Buttes School Dist.*, 345 N.W.2d 48, 51 (S.D. 1984); *Silverdale Hotel v. Lomas & Nett-Leton Co.*, 36 Wash. App. 762, 677 P.2d 773, 780 (1984); *Werner v. Xerox Corp.*, 732 F.2d 580, 584 (1984); *Fretz Const. Co. v. Southern Nat. Bank*, 626 S.W.2d 478, 483 (Tex. 1982).

In the case of a gratuitous promise where the promisee did not forego alternative opportunities, the award of expectation damages or specific performance to the promisee may work a hardship upon the promisor. For instance, in cases of informal gratuitous promises to convey land, two alternative remedies may prove to be more equitable to the promisor without being ineffective in protecting the promisee. A court may award the promisee an amount of damages equal to the value of the improvements he made on the land. His remedy would then be in quasi-contract or unjust enrichment. Still, this remedy may be inadequate if the promisee has made expenditures which exceeded the value of the improvements attached to the property, or if the improvements were of no value to the property and did not benefit the promisor. In such cases, reliance damages would seem to be an equitable alternative that protects the promisee without producing undue hardship upon the promisor.

Furthermore, courts have frequently awarded restitution damages to the party to an oral contract who has rendered part performance and has thus conferred a benefit on the opposite party.<sup>265</sup> Such cases have never been considered as nullifying the form requirement. In line with these restitutionary cases, promissory estoppel should be applied where one party to an oral promise has reasonably relied to his detriment, even though his action in reliance does not confer a benefit on the other party. The function of the doctrine in such a case should not be to enforce the gratuitous promise but merely to compensate a donee to the extent of his reliance on the promise.

### **(C) Detrimental Reliance: A Contractual or Non-Contractual Source of Obligation? The Relationship Between Cause and Detrimental Reliance**

Article 1757 of the Louisiana Civil Code provides that "obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust en-

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<sup>265</sup>See, e.g., *Dale v. Fillenworth*, 282 Minn. 7, 162 N.W.2d 234 (1968), *Jensen v. Whitesides*, 13 Utah 2d 193, 370 P.2d 765 (1962); *Turner v. White*, 329 Mass. 549, 109 N.E.2d 155 (1952). See also RESTATEMENT (SECOND) OF CONTRACTS § 375 (1981), which provides that "[A] party who would otherwise have a claim in restitution under a contract is not barred from restriction for the reason that the contract is unenforceable by him because of the Statute of Frauds unless the Statute provides otherwise or its purpose would be frustrated by allowing restitution."



richment and other acts or facts."<sup>266</sup> The article thus differentiates between two types of obligations: those which arise from a declaration of will, and those which arise directly from the law. The question is, into which category does detrimental reliance fit? It has already been shown that detrimental reliance and a unilateral declaration of will are distinguishable.<sup>267</sup> Article 1906 defines contract as "an agreement by two or more parties whereby obligations are created, modified or extinguished."<sup>268</sup> Article 1927 further states that "A contract is formed by the consent of the parties established through offer and acceptance."<sup>269</sup> Detrimental reliance does not fit precisely under either of these two articles.

Detrimental reliance requires a promise but not an agreement.<sup>270</sup> It also operates in the absence of a technical offer<sup>271</sup> or acceptance.<sup>272</sup> The consent mechanism of offer and acceptance is inappropriate in detrimental reliance cases, because the focus of judicial inquiry necessarily shifts from an examination of the will of the parties to their actions: a promise by one, reliance by the other.

It seems, therefore, that detrimental reliance fits better in the second category of obligations, those which arise directly from the law. Article 1757 of the code lists in this category: "wrongful acts, the man-

<sup>266</sup>LA. CIV. CODE art. 1757.

<sup>267</sup>See *supra* notes 201-14 and accompanying text.

<sup>268</sup>LA. CIV. CODE art. 1906.

<sup>269</sup>LA. CIV. CODE art. 1927. The article further states that "[u]nless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent."

<sup>270</sup>See, e.g., *Powers Constr. Co. v. Salem Carpets, Inc.*, 322 S.E.2d 30, 33 (S.C. App. 1984); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 265 (2d Cir. 1984); *Swansea Concrete Products, Inc. v. Distler*, 126 Ill. App. 3d 927, 467 N.E.2d 388, 392 (1984); *Bolden v. General Accident, Fire & Life Assurance Corp.*, 119 Ill. App. 3d 263, 266, 456 N.E.2d 306, 308 (1983); *Gerson Elec. Const. Co. v. Honeywell, Inc.*, 117 Ill. App. 3d 300, 312, 453 N.E.2d 726, 728 (1983); *Ripple's of Clearview, Inc. v. Le Harve Associates*, 88 A.D.2d 120, 452 N.Y.S.2d 447, 449 (1982); *Keil v. Glacier Park, Inc.*, 614 P.2d 502, 506 (Mont. 1980); *James King & Son, Inc. v. DeSantis Constr.*, 97 Misc. 2d 1063, 413 N.Y.S.2d 78, 81 (1977); *Laks v. Coast Fed. Sav. & Loan Ass'n.*, 60 C.A.3d 885, 890, 131 Cal. Rptr. 836 (1976).

<sup>271</sup>See, e.g., *Hoffman v. Red Owl Stores, Inc.*, 26 Wis. 2d 683, 697, 133 N.W.2d 267, 274-75 (1965) ("[Promissory estoppel] does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into contract if accepted by the promisee.").

<sup>272</sup>Cases of construction bidding provide an example of pre-acceptance reliance. See, *supra* notes 222-25 and accompanying text.

agement of the affairs of another and unjust enrichment." It has been suggested by some Louisiana courts that the term "wrongful act" or delict is broad enough to encompass an action of detrimental reliance<sup>273</sup> but, as stated, detrimental reliance does not require fault or negligence on the part of the promisor.<sup>274</sup> It has also been suggested that estoppel is equivalent to the concept of unjust enrichment<sup>275</sup> but the two concepts are distinguishable, for detrimental reliance does not require a benefit on the part of the promisor.<sup>276</sup> Still, this is not to say that there is no codal basis for detrimental reliance. Article 1757 does not provide an exhaustive list of the sources of obligations: "other acts and facts" may give rise to an obligation arising directly from the law.

While helpful, article 1967 of the Code does not identify the nature of detrimental reliance or determine its place in the law of obligations. As with the Restatement of Contracts, the Code left the relationship between cause and detrimental reliance unresolved. The Restaters preferred to preserve the traditional concept of consideration in section 75 and to provide a separate section for promissory estoppel liability.<sup>277</sup>

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<sup>273</sup>See cases cited *supra* note 158.

<sup>274</sup>See, *supra* notes 129-85 and accompanying text.

<sup>275</sup>See, e.g., *Burk v. Livingston Parish School Board*, 190 La. 504, 507, 182 So. 656, 657 (1938); *Dept. of Culture v. Fort Macomb Development*, 385 So.2d 1233, 1237 (La. Ct. App. 4th Cir. 1980). On the concept of unjust enrichment in Louisiana, see generally *Tate, The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process (Part I)*, 50 TUL. L. REV. 883 (1976); *Tate, The Louisiana Action for Unjustified Enrichment: A Study in Judicial Process (Part II)*, 51 TUL. L. REV. 446 (1977); *Nicholas, Unjustified Enrichment in the Civil Law and Louisiana Law (Part I)*, 36 TUL. L. REV. 605 (1962); *Nicholas, Unjustified Enrichment in the Civil Law and Louisiana Law (Part II)*, 37 TUL. L. REV. 49 (1962).

<sup>276</sup>See, e.g., *Citizens States Bank v. Peoples Bank*, 475 N.E.2d 324, 327 (Ind. Ct. App. 1985) ("The promisor need not receive any benefit or consideration from the transaction in a promissory estoppel case."); *Lacy v. Wozencraft*, 188 Okla. 19, 20, 105 P.2d 781, 783 (1940) ("In order for estoppel to arise ... it is not necessary that the one estopped receive some benefit or consideration from the particular transaction."). However, unjust enrichment is sometimes considered in determining the injustice involved in the case. See, e.g., *Donovan v. United States Postal Service*, 530 F.Supp. 872, 893 (D.C.D.C. 1981); *Oates v. Teamsters Affiliates Pension*, 482 F.Supp. 481, 489 (D.C.D.C. 1979); *Kilpatrick v. Seneca National Bank*, 213 Kan. 61, 69, 515 P.2d 781, 784 (1973).

<sup>277</sup>Gilmore tells this story:

A good many years ago, Professor Corbin gave me his version of how this likely combination came about. When the Restaters and their advisors came to the definition of consideration, Williston proposed in substance what became § 75. Corbin submitted a quite different proposal . . . Corbin, who had been deeply influenced by Cardozo, proposed to the Restaters what might be called a Cardozoan definition of consideration -- broad, vague and essentially meaningless -- a common law equivalent of *causa*, or *cause*. In the debate Corbin and the Cardozoans lost out to Williston and the Holmesians. In

The same methodology was followed in the second Restatement.<sup>278</sup> It is worth noting that during the proceedings which took place for the revision of the "cause" article of the Civil Code, the argument was made that detrimental reliance and cause should not be combined in one article, and that a separate article on detrimental reliance should be placed in the "quasi delicts" portion of the Code.<sup>279</sup> Unfortunately, this argument did not find support.

Detrimental reliance appears in chapter 5 (cause) of Title IV (conventional obligations of contracts) of the Code. Article 1967 defines cause as "the reason why a party obligates himself." The article changed the prior law by defining cause as "reason" rather than "motive," a change which was intended "for the purpose of enhancing the importance of judicial discretion in characterizing an obligation as enforceable."<sup>280</sup> Nonetheless, detrimental reliance does not fall within this definition of cause because the article treats of the reason why a party

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Williston's view, that should have been the end of the matter. Instead, Corbin returned to the attack. At the next meeting of the Restatement group, he addressed them more or less in the following manner: Gentlemen, you are engaged in restating the common law of contracts. You have recently adopted a definition of consideration. I now submit to you a list of cases -- hundreds, perhaps, or thousands? -- in which Courts have imposed contractual liability under circumstances in which, according to your definition, there would be no consideration, and therefore no liability. Gentlemen, what do you intend to do about these cases? ... The Restaters, honorable men, evidently found Corbin's argument unanswerable. However, instead of reopening the debate upon the consideration definition, they elected to stand by § 75 but to add a new section, § 90 -- incorporating the estoppel idea although without using the word "estoppel."

Gilmore, *supra* note 140, at 62-64.

Corbin described this debate in his article, *Recent Developments in Contracts*, 50 HARV. L. REV. 449, 456 (1937):

At the meeting of the Institute at which this section (90) was presented, attacks upon it were made by several members. Nevertheless, it was approved by a very large majority. The objectors were chiefly law teachers who had been taught a different rule when they were law school students and who were continuing to teach others as they themselves had been taught.

<sup>278</sup>The Second Restatement adopted the bargain theory of consideration in Section 71, which states that "[t]o constitute consideration, a performance or a return promise must be bargained for," and that "[a] performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise." Under the section, as Comment (b) provides, "In the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: the consideration induces the making of the promise and the promise induces the furnishing of the consideration." RESTATEMENT (SECOND) OF CONTRACTS § 71, Comment (b) (1981).

<sup>279</sup>Louisiana State Law Institute, Meeting of the Council, September 21-22 (1979).

<sup>280</sup>LA. CIV. CODE art. 1967 comment (a).

obligates himself, and not the reason why a court should enforce the promise. In a detrimental reliance case, as we have seen, the promise comes first, inducing the reliance. The relationship between the promise and reliance is one of "effect" and not "cause."<sup>281</sup> The existence of reliance therefore may be considered by a court as sufficient reason for imposing liability, although the making of the promise was not motivated by the acts of reliance. Cause is a part of the promisor's consent, and detrimental reliance may not be regarded as the reason why the promisor has obligated himself.

While it is true that the Code drafters did not state that detrimental reliance is cause, a reading of article 1967 may suggest that detrimental reliance was intended to be, if not the equivalent of cause, at least its substitute. Such a reading would ignore the wide variety of cases in which detrimental reliance operates outside the sphere of cause. As indicated, the doctrine of detrimental reliance may provide a remedy in cases of negotiations,<sup>282</sup> revocable offers,<sup>283</sup> and imperfect agreements,<sup>284</sup> where no other remedy would be available under the general rules of obligation. In such cases, a party may seek a non-contractual remedy on the basis of restitution or tort. The former, however, requires unjust enrichment and the latter is based on fault. Detrimental reliance dispenses with either requirement and thus may fill the gaps in cases where justifiable and reasonable reliance was not the result of fault and was not accompanied by enrichment.

Perhaps the Restatement style is justifiable at common law where matters of classification and categorization of legal principles yield to the more important task of doing justice in the individual case, but in civil law "as new principles are discovered they must be fully integrated into the system. If new data does not fit, either the system must be modified to accommodate them, or they must be modified to fit the system."<sup>285</sup> The

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<sup>281</sup>To establish a cause of action on basis of promissory estoppel, the plaintiff must prove that the reliance was induced by the promise. Corbin explains the relationship between the promise and the reliance in this manner: "[W]hen the promise comes first and induces the subsequent action in reliance, that subsequent action is an effect and not a cause of the promise." A. CORBIN, *CONTRACTS* § 196, at 199 (1963).

<sup>282</sup>*See, supra* notes 112-63 and accompanying text.

<sup>283</sup>*See, supra* notes 215-46 and accompanying text.

<sup>284</sup>*See, supra* notes 186-99 and accompanying text.

<sup>285</sup>J. MERRYMAN, *THE CIVIL LAW TRADITION* 63 (2d ed. 1985).

doctrine of detrimental reliance is still seeking its theoretical structure in the civil law system of Louisiana.

#### (D) Equity, Certainty and Detrimental Reliance

Promissory estoppel is an equitable device by which an American judge is given discretion to fill gaps in the law of promissory liability by providing plaintiffs with a remedy where none may otherwise be available.<sup>286</sup> Promissory estoppel was historically intended as a supplement or substitute to mitigate the harshness of the strict rules of contract law whenever justice required in the individual case. This rule/counter-rule methodology fits the common-law style of adjudication. A common-law judge "can mold the result in the case to the requirements of the facts where necessary to achieve substantial justice, and interpret and reinterpret in order to make the law respond to social change."<sup>287</sup>

The argument can be made that the doctrine of detrimental reliance simply does not fit the civil law system, which emphasizes certainty over equity, and predictability over flexibility. It has been observed that although certainty is the objective of every legal system, at civil law it is "a kind of supreme value, an unquestioned dogma, a fundamental goal"<sup>288</sup> which sees the need for flexibility "as a series of 'problems' complicating judge proof law."<sup>289</sup> The difference between the two systems lies in the sources of equity and its limits. In civil law jurisdictions, it is the legislature and not the judge that is given equitable powers. This does not mean, however, that the civil law is less equitable than the common law. The legislature does, however, delegate some of these powers to the judge.<sup>290</sup>

Article 21 of the Louisiana Civil Code, for instance, authorizes the judge to exercise these equitable powers. It provides that "[i]n all civil matters, the judge is bound to proceed and decide according to equity. To decide equitably, an appeal is to be made to natural law and reason or received usages, where positive law is silent."<sup>291</sup> This codal incorpora-

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<sup>286</sup>See, e.g., *United Steel Workers v. United States Steel Corp.*, 492 F.Supp. 1, 5 (N.D. Ohio 1980); *Shoemaker v. Mountain States Tel. & Tel. Co.*, 38 Colo. App. 321, 559 P.2d 721, 723 (1977); *Cochran v. Ollis Creek Coal Company*, 157 W. Va. 931, 936-937, 205 S.E. 410, 414 (1974).

<sup>287</sup>289. J. MERRYMAN, *supra* note 287, at 51.

<sup>288</sup>*Id.* at 63.

<sup>289</sup>*Id.* at 49.

<sup>290</sup>*Id.* at 52.

<sup>291</sup>LA. CIV. CODE art 21. (1870). See Revised LA. CIV. CODE art. 4.

tion of equity is not meant to authorize the adoption of the methodological premises of Equity as a separate system as it developed at common law. The role of equity under article 21 is to provide the judge with guidance in filling the gaps in *cases in which positive law is silent*.<sup>292</sup> Equity is also employed when a judge is called to interpret a contract where there is a doubtful provision<sup>293</sup> or where a provision is not provided for by the parties.<sup>294</sup> Equity in these instances, as article 2055 states, "is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another."<sup>295</sup> Prevention of detrimental reliance or unjust impoverishment also complements the prevention of unjust enrichment. Both concepts are based on the premise of fairness and justice, and both give a civilian judge great flexibility in applying the general rules of liability. Such flexibility is also achieved through the application of the civilian doctrines of abuse of rights,<sup>296</sup> good faith,<sup>297</sup> and good morals and public order,<sup>298</sup> all of which mitigate the harshness of strict rules of law. As French professor René David said, "The law is not an end in itself .... An attachment for formalism must not lead us to sacrifice the means to the end. The strictness of the law must be relaxed if its strict application violates what we believe justice requires."<sup>299</sup>

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<sup>292</sup>See, Franklin, *Equity in Louisiana*, TUL. L. REV. 485, 495-96 (1935).

<sup>293</sup>LA. CIV. CODE art. 2053 ("A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties"). Comment (a) explains that "courts may resort to equity for guidance only when the meaning of a provision is in doubt. They may not do so in order to enlarge or restrict the scope of a contract or provision whose meaning is apparent".

<sup>294</sup><sup>296</sup>LA. CIV. CODE art. 2054 ("When the parties made no provision for a particular situation it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose").

<sup>295</sup>LA. CIV. CODE art. 2055.

<sup>296</sup>See, *supra* notes 182-83 and accompanying text.

<sup>297</sup>See, *supra* notes 164-81 and accompanying text.

<sup>298</sup>See, e.g., French Civ. Code art. 6 (Crabb trans. 1977) ("[O]ne may not annul by private agreements laws which involve public policy and morality"). See R. DAVID, *FRENCH LAW: ITS STRUCTURE, SOURCES AND METHODOLOGY*, 194-207, reprinted in DAINOW, *THE ROLE OF JUDICIAL DECISIONS AND DOCTRINE IN CIVIL LAW IN MIXED JURISDICTIONS* 119-32 (1974).

<sup>299</sup>301. R. DAVID, *supra* note 300, at 132.

## CONCLUSION

Failure to recognize the doctrine of promissory estoppel as an independent basis of liability contributed, in my judgment, to the misunderstanding of the doctrine in English law and in civil law. In both systems of law, the doctrine has been analyzed as a substitute for consideration. In England, its use was largely rejected on the grounds that it would give rise to a cause of action in contract in the absence of consideration. Thus, promissory estoppel may apply only in cases of adjustment of on-going transactions or abandonment of an existing right. Its application, therefore, assumes the existence of a pre-contractual relationship. In addition, the doctrine may only serve as a shield, not as a sword. Departure from this traditional analysis would be essential if the doctrine is to be recognized at English law in cases of gratuitous promises, negotiations, unilateral offers and the like, where the traditional rules prove insufficient to protect the reliance interest.

In civil law jurisdictions, the argument has been made that there is no need to resort to a substitute for cause because, under the concept of cause, a gratuitous promise is enforceable and promissory estoppel would then serve no useful end. This study has attempted to show, however, that the difficulties in common law that arise from adopting consideration as the test of enforcing gratuitous promises have their counterpart in the civil law, which requires some kind of formality for such enforcement. Where a gratuitous promise not meeting the requirement of form must be enforced in order to avoid injustice, a civilian judge is frequently forced to resort to the strained reasoning that the gratuitous promise was actually onerous. Instead, promissory estoppel could further complement the civilian doctrines of culpa in contrahendo, abuse of rights, good faith, preliminary contract and promise to contract, in protecting the reliance interest.

