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COMMENTS

PROMISSORY ESTOPPEL MAY MAKE AN OFFER IRREVOCABLE

JUDSON A. CRANE*

Promissory Estoppel, as embodied in the Restatement of Contracts Section 90, is a basis for holding binding promises followed by foreseeable substantial detrimental reliance by the promisee, although bargained-for consideration is lacking. This is an equitable principle of long standing.[1] It has been applied frequently in cases of donative promises,[2] including subscriptions to charitable institutions.[3] Its application to commercial transactions, such as offers, has been rare. Most business offers, if not in the form of options, are promptly accepted by act or counter promise. Such offers are normally made with a continuing desire that they be accepted. Once there is acceptance and a contract formed, there is no occasion to invoke promissory estoppel. Donative promises are not capable of acceptance and consequently conventional contracts cannot result from them.

The occasional case involves an offer, the terms of which embody a unilateral mistake of the offeror, followed by detrimental reliance

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1 It is noted in the opinion of Justice Stern in Fried v. Fisher, 328 Pa. 497, 196 Atl. 39 (1938), upholding a voluntary release of a co-lessee who vacated and went into another business, that Dean Ames in his Lectures on Legal History, p. 143 finds that before 1500 equity gave relief to plaintiffs who had incurred detriment on the faith of defendant's promises.

A leading American case antedating Restatement, Contracts § 90 (1932), enforcing a gratuitous promise on which the promisee had relied to her detriment, as the promisor expected, is Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898).

2 A familiar application is the sustaining as valid obligations of promises of pensions to retiring employees, who quit work and refrain from competitive employment. Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 Atl. 571 (1932); Feinberg v. Pfeiffer Company, 322 S.W.2d 163 (Mo. App. 1959).

3 While approving promissory estoppel in principle, some courts have found that the continuing operation of a charity is such asked-for detrimental conduct as to constitute real consideration. Allegheny College v. National Chautauqua County Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173 (1927); L & I Holding Corp. v. Gainsberg, 276 N.Y. 427, 12 N.E.2d 532 (1932). Cases applying promissory estoppel to various situations are collected in 1 Williston, Contracts (3d ed. 1957) § 140; 1 Corbin, Contracts (1950) § 194 et seq.; 3 Pomeroy's Equity Jurisprudence (5th ed. 1941) § 8086; 48 A.L.R.2d 1069 and prior annotations.

on the part of the offeree, which falls short of acceptance and a subsequent effort on the part of the offeror who has now discovered his mistake to retract the offer. Such a case was *James Baird Co. v. Gimble Bros. Inc.*[4] Gimble Bros. had made offers to prospective bidders on a public building project to supply specified linoleum at a stated price. In the computation of the quoted price, Gimble made a serious mistake. The plaintiff, with no reason to know the mistake, used Gimble's offer in preparing the low bid which resulted in the contract award. The defendant discovered its error prior to the receipt of the plaintiff's acceptance and revoked its offer. The plaintiff brought an action for damages relying on the principles of promissory estoppel. The District Court dismissed the complaint and the Court of Appeals affirmed, the opinion by L. Hand, J., stating that the application of promissory estoppel was confined to donative promises. The holding is rationalized by Corbin as follows:

> If a promisee offers his promise as part of a bargain for and in consideration of specified equivalent, the promisee cannot make the promise binding by acting in reliance upon it in a manner that constitutes no part of that specified equivalent.[5]

A similar problem was presented to the California Supreme Court in *Drennan v. Star Paving Company.*[6] The plaintiff bid on a public building, posting a bidder's bond. In making his bid as prime contractor he relied on a bid of the defendant for the paving part of the project, having no reason to know that it was the result of a mistake in computation. The plaintiff was the lowest bidder and was awarded the contract. He called upon the defendant to notify it of his acceptance of the offer for the paving sub-contract. Before he could manifest his acceptance, he was told by the defendant the bid was a mistake and was withdrawn. The plaintiff procured the paving from another subcontractor at a price higher than the defendant's offer and sued for the difference. A judgment below for the plaintiff was affirmed, the Supreme Court relying on the principles of promissory estoppel to hold the offer irrevocable. It appeared that defendant had reason to expect its offer would be used by the plaintiff in making his bid as prime contractor, and so it did induce "action of a definite and substantial character on the part of the promisee." The problem was compared to that treated in Restatement, Contracts § 45, which deals

[4] 64 F.2d 344 (2d Cir. 1933). The decision is criticized in 28 Ill. L. Rev. 419, 20 Va. L. Rev. 214.

[5] 1 Corbin, Contracts (1950) § 200.

[6] 51 Cal. 2d 409, 333 P.2d 757 (1958).

with offers for unilateral contracts, made irrevocable after part performance.[7]

The defendant contended, on the basis of certain California decisions and Civil Code Provisions, that a contract could be avoided by reason of unilateral mistake. The court, however, disposed of this argument by noting that in the decisions cited the other party had reason to know of the mistake and could be restored to status quo on rescission. Neither fact existed in the case at bar.[8]

As the transaction in the *Drennan* case was a construction contract and a subcontract of part of the work, that case did not involve a sale and would not be governed by the Uniform Commercial Code. However, the *Gimble* case involving a sale would be subject to the Code. Aside from the promissory estoppel issue, the question would then be whether the supplier's bid was, under Section 2-205, a firm offer though not expressly so designated. If, as in the *Drennan* case, it could be shown that there was a trade usage under which suppliers made bids on the eve of the prime contractor's submission of their bids, with the intent and understanding that they should be used as a component of the latter's bid, it might be held that by such usage these offers were firm offers, irrevocable for a reasonable time.[9] What effect if any the offeror's mistake would have would depend on the general law of mistake.[10]

The *Drennan* case appears to be a proper application of the principles of Promissory Estoppel. It should be distinguished from cases in which there is no justifiable reliance, as where the promisee or offeree knows of the offeror's mistake or has reason to know,[11] or cases in which the offeree does not promptly accept the offer, but in effect rejects it by making a counter offer,[12] or cases in which the

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[7] Cited by the Court as being on all fours was Northwestern Engineering Co. v. Ellerman, 69 So. Dak. 397, 100 N.W.2d 879 (1943) which was similarly decided. The opinion also cites Robert Gordon Inc. v. Ingersoll Rand Co., 117 F.2d 654 (7th Cir. 1941), a decision which while approving the application of promissory estoppel to commercial cases found a lack of justifiable reliance, as the offeree knew of the offeror's mistake.

See also Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948).

[8] Restatement, Contracts § 503 (1932) states that unilateral mistake is no basis for rescission as against another party who has no reason to know of the mistake. There is a significant trend to the contrary where the status quo can be restored after the mistake is discovered and rescission sought. See St. Nicholas Church v. Kropp, 135 Minn. 115, 160 N.W. 500 (1916).

[9] UCC § 2-205.

[10] UCC § 1-103.

[11] Robert Gordon Inc. v. Ingersoll Rand Co., supra note 7.

[12] R. J. Daum Const. Co. v. Child, 122 Utah 194, 247 P.2d 817 (1952).

promisee alleges forbearance to act in reliance on the promise but does not show that it was possible for him to do anything.[13]

[13] Union Trust Co. v. Long, 309 Pa. 470, 164 Atl. 346 (1932).