COMMERCIAL LAW


In Farmland Services Co-op v. Klein,\(^1\) the Nebraska Supreme Court held that the doctrine of promissory estoppel\(^2\) cannot be invoked to avoid the Statute of Frauds,\(^3\) except in a limited situation. In its holding, the court emphasized the continued importance of the Statute of Frauds and gave a restricted definition of promissory estoppel. The issue raised by the court—the relationship between promissory estoppel and the Statute of Frauds—is the subject of this note.

FACTS AND HOLDING

The seller orally agreed to sell 90,000 bushels of corn to the buyer.\(^4\) This agreement was an entirely oral transaction, with no confirming memorandum having been sent to the buyer.\(^5\) The

\(^{1}\) 196 Neb. 538, 244 N.W.2d 86 (1976).
\(^{2}\) The court relied on § 90 of RESTATEMENT (SECOND) OF CONTRACTS (Tent. Dr. No. 2, 1965) for the definition of promissory estoppel:
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 the enforcement of the promise. The remedy for breach may be limited as justice requires.
\(^{3}\) The particular Statute of Frauds involved was U.C.C. § 2-201 which provides in pertinent part:
Except as otherwise provided in this section a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.
[All citations to the U.C.C. in this article will be to the 1962 official text unless otherwise indicated.]
\(^{4}\) 196 Neb. at 539, 244 N.W.2d at 88.
\(^{5}\) Id. at 539-40, 244 N.W.2d at 88. Had there been a confirming memorandum, the transaction may have been subject to subsection (2) of § 2-201 which provides:
Between merchants if within a reasonable time a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.
trial court sustained the seller's motion for summary judgment, stating that the action was barred by the Statute of Frauds. On appeal, the buyer urged reversal, arguing that its cause of action was based on promissory estoppel. The buyer contended that promissory estoppel raised issues of fact and therefore precluded sustaining the motion for summary judgment. The court rejected the buyer's argument for three reasons. First, it found that to allow promissory estoppel to avoid the Statute of Frauds would render the Statute "meaningless and nugatory." Second, the court stated that section 2-201 of the Uniform Commercial Code contains no promissory estoppel exception to the Statute of Frauds. Finally, it held that promissory estoppel has traditionally been used to "supply" the element of consideration and is, therefore, limited to non-bargain transactions.

However, whether subsection (2) would have been applicable where one of the parties is a farmer would turn on whether a farmer is a "merchant" within the meaning of U.C.C. § 2-104(1): "'Merchant' means a person who deals in goods of the kind or otherwise by his occupation holds himself out as having knowledge or skill peculiar to the practices or goods involved in the transaction. . . ." There is a split of authority on this question. Compare Sierens v. Clausen, 60 Ill.2d 585, 326 N.E.2d 1 (1975) (farmer who had been engaged in farming for 34 years, had nearly 400 acres under cultivation, and had been selling his crops to grain elevators for five years a merchant) with Decatur Coop. Assoc., v. Urban, 219 Kan. 171, 547 P.2d 323 (1976) (farmer who had engaged in wheat farming business for twenty years, had 1200 farmable acres, had been selling crops to elevators for seven years and was aware of customary business procedures of elevator not a merchant). Nebraska has not ruled on this issue.


A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specifically manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (section 2-608).

11. 196 Neb. at 545, 244 N.W.2d at 90.
BACKGROUND

THE STATUTE OF FRAUDS

The Statute of Frauds was originally enacted for the purpose of preventing "many fraudulent practices, which are commonly endeavored to be upheld by perjury and subordination of perjury." The circumstances giving rise to the enactment of the statute were the trial system in England which was forced to depend on unreliable juries, the existence of few rules of evidence, and the fact that parties to an action were incompetent witnesses. Although the conditions warranting the original Statute of Frauds no longer exist, its retention has been justified on three grounds:

(1) The Statute serves an 'evidentiary' function, lessening the danger that courts or juries will be misled by perjured testimony as to the existence or purport of a contract; (2) it has a 'cautionary effect,' tending to impress upon the contracting parties the significance of their agreement; and (3) it acts as a 'channeling' device, providing a basis for distinguishing contracts which are enforceable from those which are not.

Although both commentators and courts have ques-

12. 29 Car. 2, C. 3 (1677).
14. Thus Corbin points out that there is greater confidence at present in the capacity of courts and juries to determine the truth by means of oral testimony than there was in the time of Charles II. The rules as to the competency of witnesses and the admissibility of testimony have been made much more liberal. Perjury on the witness stand may be less common than it once was.
16. Corbin, The Uniform Commercial Code—Sales: Should It Be Enacted?, 59 YALE L.J. 821, 829-34 (1950); Bardick, A Statute for Promoting Fraud, 16 COLUM. L. REV. 273 (1916); Summers, supra note 13, at 441-43; Willis, The Statute of Frauds—A Legal Anachronism, 3 IND. L.J. 427, 528 (1928). Thus, Corbin asserts that the purpose of the Statute of Frauds was to prevent the enforcement of alleged promises that were never made, not to justify contracting parties in repudiating promises that were in fact made. He goes on to say that his study has convinced him of the following: The Statute of Frauds is not uniformly applied; our judicial system is superior to that of 1677 and consequently, fraudulent and perjured testimony are far less likely to succeed; the requirement of a writing is at odds with the habits of men; by enforcing detailed formal requirements, courts foster dishonest repudiation without preventing fraud; and courts
tioned the continued validity of the statute, a version of it is in effect in every American jurisdiction. Nevertheless, courts have invented devices for avoiding the statute's effect of rendering oral contracts unenforceable. Two of these devices are equitable estoppel and promissory estoppel.

**Equitable Estoppel**

Equitable estoppel was recognized by the common law at a very early date. It is distinguished from other forms of estoppel in that it arises from the conduct of a party. Its purpose is "to prevent the unconscientious and inequitable assertion or enforcement of claims or rights which might have existed or been enforceable by other rules of law . . . and its practical effect is . . . to create and vest opposing rights in the party who obtains the benefit of estoppel." Historically, six elements were required in order for an equitable estoppel to arise:

1. **EQUITABLE ESTOPPEL**

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   17. See, e.g., McIntosh v. Murphy, 52 Haw. 29, 469 P.2d 177, 179-81 (1970).
   18. The Uniform Commercial Code has a provision requiring that certain contracts for the sale of goods be in writing. See note 3 supra.
   19. Other historical exceptions to the Statute of Frauds include: (1) the doctrine of part performance which has been applied primarily to contracts concerning land; (2) the impositions of constructive trusts; (3) quasi-contracts; (4) the "main purpose" rule; and (5) the joint obligor rule. For discussions of these exceptions, see Note, *Promissory Estoppel As A Means of Defeating the Statute of Frauds*, 44 Fordham L. Rev. 114, 115-16 (1975); 66 Mich. L. Rev., supra note 15, at 171-72.
   21. Estoppel by record operates as a bar to preclude a person from denying the truth of a fact which has become settled by proceedings of judicial or legislative officers. May v. City of Kearney, 145 Neb. 475, 17 N.W.2d 448 (1945). In estoppel by deed, a grantor is estopped by his deed to question the capacity of his grantee to take the estate conveyed by the deed. Carr v. Miller, 105 Neb. 623, 181 N.W. 557 (1921).
   22. Pomeroy, supra note 20, § 802, at 180 (1941). "Conduct" is used in its broadest meaning "as including his spoken or written words, his positive acts, and his silence or negative omission to do anything."
   23. Id. Pomeroy thus defines equitable estoppel as the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might perhaps have otherwise existed, either of property, of contract, or of remedy, as against another person, who has in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy.

   *Id.* § 804, at 189. Gilmore has described estoppel more pithily as "simply a way of saying that, for reasons which the court does not care to discuss, there must be judgment for the plaintiff." G. Gilmore, *The Death of Contract* 64 (1974) [hereinafter cited as Gilmore].
(1) There must be conduct—acts, language, or silence—amounting to a misrepresentation 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 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 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...  

Although courts of equity originally enforced contracts otherwise barred by the statute in order to prevent fraud, actual fraud is no longer essential to successful assertion of equitable estoppel. There is divergence of opinion on the question of whether the first two elements of Pomeroy's definition, which require the misrepresentation to be of a present or past fact, are still necessary to equitable estoppel. Thus, the Illinois Supreme Court in Ozier v. Haines held that where there had been no misrepresentation of fact the defendant could not be estopped from pleading the Statute of Frauds.

The California courts, on the other hand, have considerably

24. POMEROY, supra note 20, § 805, at 191-92 (emphasis in original).  
26. POMEROY, supra note 20, § 805, at 193-94. "It is not absolutely necessary that the conduct . . . be done with fraudulent purpose or intent, or with actual and fraudulent intention of deceiving the other party." See also 53 CAL. L. REV., supra note 25, at 595. But see Hurst v. Thomas, 265 Ala. 398, 91 So.2d 692 (1956); Newman v. Newman, 103 Ohio St. 230, 133 N.E.2d 70 (1921) (requiring proof of actual fraud).  
27. Compare Ozier v. Haines, 411 Ill. 160, 103 N.E.2d 485 (1952) (requiring misrepresentation to be of present or past fact) with Monarco v. Lo Greco, 35 Cal.2d 621, 222 P.2d 737 (1950) (not requiring a representation of present or past fact).  
broadened the doctrine of equitable estoppel in Statute of Frauds cases. In *Seymour v. Oelrichs*® the court allowed application of the doctrine where there had been a representation that an oral employment agreement would be reduced to a writing and in reliance thereon the plaintiff gave up his job.® Later, in the famous case of *Monarco v. Lo Greco*,® the court held that a person could be estopped from asserting the Statute of Frauds where (1) "unconscionable injury" would result from denial of enforcement of the contract after one party had been induced to substantially alter his position; or (2) the party relying on the statute would be unjustly enriched.®

*Monarco* did not discuss the policies underlying the Statute of Frauds. However, in establishing a position which "calls for a case-by-case definition of when reliance loss is 'unconscionable' and when enrichment is 'unjust',"® the court implicitly limited the requirements of the statute.® This position, and the result-

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30. 156 Cal. 782, 106 P. 88 (1909).
31. Id. at —, 106 P. at 96. In holding that a representation of a future intention to reduce an oral contract to writing was sufficient to create an equitable estoppel, the court was really applying promissory estoppel. The court discussed at length the traditional application of equitable estoppel to situations involving misrepresentations of facts but concluded that the oral agreement was made "under such circumstances that the irrevocable surrender by plaintiff of his position . . . in full reliance thereon made it . . . a binding contract."
32. 35 Cal. 2d 621, 220 P.2d 737 (1950).
33. Id. at —, 220 P.2d at 739-40. The facts in *Monarco* were particularly appealing for application of estoppel. A son had foregone the opportunity to leave home and make his own life on the basis of an oral promise from his mother and stepfather that if he would stay home and work, they would leave him the bulk of their property. The son worked many years, receiving only room, board, and spending money. During this period, the stepfather again made the promise. However, shortly before his death, the stepfather conveyed the property to his grandchild. For discussion of *Monarco* and subsequent California cases, see 53 CAL. L. REV., supra note 25, at 595-606; 66 Mich. L. Rev., supra note 15, at 175-77.
35. For a discussion of *Monarco* and subsequent California cases see Macaulay, *Justice Traynor and the Law of Contracts*, 13 STAN. L. REV. 812, 829 (1961) wherein the author suggests that these cases involve a "tacit rejection of the legislature's judgment that the gains to the functioning of the market from
ing expansion of the doctrine of equitable estoppel, when compared to the position taken by the Illinois court,\(^\text{36}\) points up the basic problem in these estoppel cases: whether the policies of the Statute of Frauds are to be strictly enforced or whether a party's reliance on an oral promise should render that promise enforceable.

**Promissory Estoppel**

Unlike equitable estoppel, which traditionally has required a misrepresentation of past or present fact,\(^\text{37}\) promissory estoppel requires reliance on a promise or a representation as to future action. Thus, because the reliance is on a promise and not a misstatement of fact, the term promissory estoppel is used.\(^\text{38}\)

Although the idea of promissory estoppel—that a gratuitous promise may be enforceable where the promisee has foreseeably acted in reliance to his detriment—was early implemented by the courts,\(^\text{39}\) it is usually associated with Restatement of Contracts, section 90, which provides: “A promise which the promisor should reasonably expect to induce action or forebearance of a definite and substantial character on the part of the promisee and which does induce such action or forebearance is binding if injustice can be avoided only by enforcement of the promise.”

Known as the “reliance doctrine,” promissory estoppel may be viewed as simply an expansion of “equitable estoppel” in that it includes representations and statements as to future events or conduct.\(^\text{40}\) However, exactly what role promissory estoppel was intended to play in contracts was not enunciated in the Restatement.\(^\text{41}\) It has been argued that section 90 was intended to make enforceable gratuitous promises\(^\text{42}\) where there was requiring certain kinds of contracts to be written always are worth the cost in disrupted plans and reliance loss.”

\(^{36}\) See text at note 28 supra.
\(^{37}\) See text at note 27 supra.
\(^{38}\) 1 S. Williston, Contracts § 140, at 607-09 (1957).
\(^{39}\) See, e.g., Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365 (1898), one of the earliest cases embodying the rationale of promissory estoppel, discussed in Boyer, Promissory Estoppel: Principle From Precedents: II, 50 Mich. L. Rev. 873, 886-88 (1952). See also Seymour v. Oelrichs, 156 Cal. 782, 106 P. 88 (1909) and text at note 30 supra.
\(^{40}\) Gilmore, supra note 23, at 129 n.145. See also Monarco v. Lo Greco, 35 Cal.2d 621, 220 P.2d 737 (1950) in which the California court's expansion of “equitable estoppel” was closer to promissory estoppel.
\(^{41}\) “An attentive study of the four illustrations [to § 90] will lead any analyst to the despairing conclusion, which is of course reinforced by the mysterious text of § 90 itself, that no one had any idea what the damn thing meant.” Gilmore, supra note 23, at 64-65.
\(^{42}\) “Gratuitous promise” refers to a promise unsupported by consideration.
COMMERCIAL LAW

an absence of formal acceptance or consideration\textsuperscript{43} and thus has no application to the usual Statute of Frauds situation.\textsuperscript{44} Regardless of whether section 90 was intended to apply to only gratuitous promises and non-commercial situations,\textsuperscript{45} courts have used it to cover the reliance elements in bargain transactions.\textsuperscript{46}

While promissory estoppel was being expanded to cover bargain transactions, it was also being urged as a way of avoiding the Statute of Frauds. Judicial response to this urging has been for the most part confusing. However, as in the equitable estoppel cases, the basic consideration, although rarely articulated by courts, is whether the statute is to be enforced at the expense of a plaintiff “who had, to his detriment, relied on a defendant’s assurances without the protection of a formal contract.”\textsuperscript{47}

\textsuperscript{43} 66 Mich. L. Rev., supra note 15, at 177-78. A strict interpretation of § 90 and its placement in the Restatement would support this view. Section 90 appears in the chapter of the Restatement which deals with the formation of informal contracts and is set forth under the topic heading “Informal Contracts Without Assent Or Consideration.” Section 85, the first provision under this topic heading, allows for certain circumstances where neither manifestation of assent nor consideration is necessary for the formation of a contract. Section 90 sets forth as one of the circumstances where consideration is not necessary the situation where the promisee foreseeably and detrimentally relies on the promise. Thus, § 90 would appear to be limited to the enforcement of gratuitous promises after the promisee has acted in reliance in a way which the promisor should have foreseen. In regard to why and how § 90 found its way into the Restatement, Gilmore relates that Professor Corbin proposed a broad and vague definition of consideration to the “Restaters.” This definition was rejected in favor of Williston’s “bargain theory of consideration,” which is embodied in § 75. However, Corbin persisted, arguing that there were hundreds of cases in which courts had imposed contractual liability under circumstances in which, according to § 75, there would be no consideration and hence no liability. The “Restaters” yielded to Corbin, but “instead of reopening the debate on 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.’”

\textsuperscript{44} 66 Mich. L. Rev., supra note 15, at 177.

\textsuperscript{45} Gilmore points out that in early judicial and academic discussions of § 90 there was a general assumption that § 90 would have its application in mostly non-commercial situations. He cites James Baird Co. v. Gimbel Bros., 84 F.2d 344 (2d Cir. 1933) in which Judge Learned Hand suggested that § 90’s scope should be restricted to donative or gift promises. Gilmore, supra note 23, at 66.

\textsuperscript{46} Perhaps the most notable cases are those in which courts applied the doctrine to make a contractual offer irrevocable. The typical situation was where a general contractor, in reliance on a subcontractor’s bid, submitted a bid and got the contract, but the subcontractor withdrew his bid before the contractor could officially accept it. In these situations, some courts have held that the subcontractor should have foreseen that the contractor would rely on his offer. See, e.g., Drennan v. Star Paving Co., 51 Cal.2d 409, 333 P.2d 757 (1958) For the development of promissory estoppel see Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 Yale L.J. 343 (1969); Boyer, Promissory Estoppel: Principle From Precedents, 50 Mich. L. Rev. 639, 873 (1952).

\textsuperscript{47} Gilmore, supra note 23, at 63-64.
Courts have taken varying approaches to the problem. Some jurisdictions absolutely preclude the use of promissory estoppel in Statute of Frauds cases.\textsuperscript{48} The thrust of these decisions is directed to the continued importance of the Statute of Frauds. Thus, in \textit{Kahn v. Cecelia Co.},\textsuperscript{49} the court held that the practical effect of allowing promissory estoppel to avoid the Statute of Frauds, would be to repeal the statute.\textsuperscript{50} Another court has held that it would not be proper to judicially counteract the legislatively created Statute of Frauds by allowing promissory estoppel in oral contract cases.\textsuperscript{51}

Where there has been a promise to reduce an oral contract to a writing, some courts, relying on \textit{Restatement of Contracts}, section 178, Comment \textsuperscript{f} have estopped the assertion of the Statute of Frauds. Comment \textsuperscript{f} says that a party may be estopped from asserting the Statute of Frauds where there has been a misrepresentation that the statute's requirements have been complied with or where there is a promise to reduce the oral contract to a writing. Accordingly, the misrepresentations allows for an equitable estoppel while the promise to reduce the oral contract to a writing allows for a promissory estoppel. Either will preclude the assertion of the Statute of Frauds in jurisdictions which follow this view.

Thus in \textit{21 Turtle Creek Square, Ltd. v. New York State Teachers' Retirement System},\textsuperscript{53} the court stated that while it recognized section 90, its applicability is limited.\textsuperscript{54} However, the court found that in cases dealing with oral promises coming within the Statute of Frauds "Comment \textsuperscript{f} to § 178, \textit{Restatement of Contracts} must be considered concomitant with § 90."\textsuperscript{55} The

\textsuperscript{48} See, e.g., Kahn v. Cecelia Co., 40 F. Supp. 878 (S.D.N.Y. 1941); Tannenbaum v. Biscayne Ostepathic Hospital, 190 So.2d 777 (Fla. 1966); Sinclair v. Sullivan Chevrolet So., 432 F.2d 64 (5th Cir. 1970).

\textsuperscript{49} 40 F. Supp. 878 (S.D.N.Y. 1941).

\textsuperscript{50} Id. at 880.

\textsuperscript{51} Tannenbaum v. Biscayne Ostepathic Hospital, 190 So.2d 777, 779 (Fla. 1966).

\textsuperscript{52} See note 31 \textit{supra}.

\textsuperscript{53} 432 F.2d 64 (5th Cir. 1970).

\textsuperscript{54} Id. at 65.

\textsuperscript{55} Id. The court found this to be the proper reading of Cooper Petroleum Co. v. LaGloria Oil & Gas Co., 436 S.W.2d 889 (Tex. 1969) in which the Texas Supreme Court enforced an oral promise where the defendant had promised to sign a written guarantee for the purpose of inducing plaintiff to continue mak-
court held that where the case involves the Statute of Frauds, there exists the further requirement of reliance upon a second promise to reduce the first promise to a writing.\(^5\) Finally, the court implied that the defense of the Statute of Frauds is only precluded in those situations described in section 78, Comment f.\(^5\) 

At least one court has adopted the position offered by section 217A of the Restatement (Second) which states: "A promise which the promisor should reasonably expect to induce action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires."\(^5\) In McIntosh v. Murphy,\(^5\) the Hawaii court noted the traditional justifications for the Statute of Frauds\(^6\) and then stated:

It is appropriate for modern courts to cast aside the raiments of conceptualism which cloak the true policies underlying the reasoning behind the many decisions enforcing contracts that violate the Statute of Frauds. There is certainly no need to resort to legal rubrics or meticulous legal formulas when better explanations are available. The policy behind enforcing an oral agreement which violated the Statute of Frauds [is] a policy of avoiding unconscionable injury. . . . \(^6\)

The court found section 217A the frame of a workable test which is flexible enough to cover diverse factual situations and also provide reviewable standards.\(^6\)

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56. 432 F.2d at 65.
58. Restatement (Second) of Contracts § 217A (Rev. Tent. Draft Nos. 1-7, 1973). Subsection (2) lists these circumstances to be considered in determining whether injustice can be avoided only by enforcing the promise:
   (a) the availability and adequacy of other remedies, particularly cancellation and restitution;
   (b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
   (c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
   (d) the reasonableness of the action or forbearance;
   (e) the extent to which the action or forbearance was foreseeable by the promisor.
59. 52 Haw. 29, 469 P.2d 177 (1970).
60. See text at note 14 supra. See also Fuller, Consideration and Form, 41 Colum. L. Rev. 799, 800-01 (1941); 66 Mich. L. Rev., supra note 15, at 170-71 (1967).
61. 52 Haw. at —, 469 P.2d at 180.
62. Id. at —, 469 P.2d at 181.
Yet another approach to this issue was taken by the Kansas court in *Decatur Cooperative Association v. Urban.* In *Decatur,* an elevator cooperative had orally agreed to purchase the defendant's wheat. The defendant later breached and the cooperative lost some $10,000 to cover its resale to regional elevators. The court found that "the doctrine of promissory estoppel may render enforceable any promise upon which the promisor intended, or should have known, that the promisee would act to his detriment. . . ." The court then set the following conditions to be met in order to invoke promissory estoppel in cases involving the Statute of Frauds. First, the promisee must show that a valid and otherwise enforceable contract was entered into by the parties. Second, the conduct of the promisor must be something more than a refusal to perform an oral contract, since any party to an oral contract unenforceable under the statute has that right. Third, the promisor must have intended, and reasonably expected, that the promisee would rely on the promise and the promisee must have acted reasonably in relying upon the promise. Finally, the court said it would allow promissory estoppel if a refusal to enforce the contract would be to sanction a fraud or other injustice.

**THE NEBRASKA DECISION**

In *Klein,* the Nebraska Supreme Court offered three reasons for rejecting the buyer's assertion of promissory estoppel. The most important reason, though not discussed by the court, was given when the court stated, "The statute of frauds is still operative in this jurisdiction and that allowing promissory estoppel to avoid the statute would render it 'nugatory.'" In support of this view, the court noted that U.C.C. section 2-201 contains no promissory estoppel exception to the Statute of Frauds. It then reasoned that promissory estoppel has tradi-
tionally been resorted to as a substitute for consideration "where to refuse enforcement of a promise unsupported by consideration would work an injustice to the party who relied to his detriment on the promise." Finally, it stated that "promissory estoppel usually applies only in cases where there is a promise or representation as to an intended abandonment by the promisor of a legal right which he holds or will hold against the promisee."  

As an illustration of a situation to which promissory estoppel would apply, the court set out the facts of *Hecht v. Marsh,* a case on which the buyer in *Klein* had relied in urging that the seller was estopped from asserting the Statute of Frauds. In *Hecht,* a seller of land conditioned his signing the contract upon the buyer putting up forfeit money. To induce the seller to waive this requirement, the broker orally agreed to waive his commission if the transaction was not completed. When the contract was not performed, the broker sued for his commission. The court held that the broker was estopped from asserting the Statute of Frauds as a defense saying that equity will not allow the Statute of Frauds to be used as an instrument of fraud. The *Klein* court then stated:

Where a party to a written contract within the statute of frauds induces another to waive some provision upon which he is entitled to insist and thereby change his position to his disadvantage because of that party's inducement, the inducing party will be estopped to claim that such oral modification is invalid because not in writing.

The court distinguished the situation in *Klein* from that in *Hecht.* Basically, it found that in *Klein,* there had been no inducement on the part of the seller to justify the buyer's reliance on the oral promise. Unlike the broker in *Hecht,* the seller in *Klein* was not asserting a right which he had promised through this section. See, e.g., Farmers Coop. Ass'n of Churchs Ferry v. Cole, 239 N.W.2d 808, 813 (N.D. 1976) (but denying estoppel where no finding of fraudulent action on part of defendant); Farmers Elevator Co. of Elk Point v. Lyle, 238 N.W.2d 290, 293 (S.D. 1976) (allowing estoppel where agreement established by satisfactory evidence, reliance by the promisee, and enforcement of the statute will subject such party to unconscionable hardship and loss).

71. 196 Neb. at 544, 244 N.W.2d at 90. See also Kahn v. Cecelia Co., 40 F. Supp. 878, 879 (1941).
72. 196 Neb. at 544, 244 N.W.2d at 90. See also 1 S. WILLISTON, CONTRACTS § 140, at 611-12 (1957).
73. 105 Neb. 502, 181 N.W. 135 (1920).
74. Id. at 503, 181 N.W. at 136.
75. Id. at 507, 181 N.W. at 137.
76. 196 Neb. at 543, 244 N.W.2d at 89-90.
77. Id. at 544, 244 N.W.2d at 90.
to forego. Finally, the court stated that a "mere pleading of reliance on a contract to his detriment should not be sufficient to permit a party to assert rights and defenses based on a contract barred by the Statute of Frauds." 78

Although not articulated by the court, the real problem in 
Klein is a balancing of a party's reliance on an oral promise against the policies of the Statute of Frauds. Despite the court's statement that promissory estoppel operates as a substitute for consideration, 79 the fact is that the "reliance doctrine" of promissory estoppel is a concept distinct from consideration. Thus, in those cases in which courts have allowed promissory estoppel to render enforceable an oral promise, the courts were not employing promissory estoppel to "supply the element of consideration." Rather, they were acknowledging that the degree of a promisee's reliance on an oral promise was sufficient to enforce the promise where to do otherwise, and enforce the statute, would work injury on the promisee. 80

The balancing of these considerations—the degree of reliance and the policies of the statute—is rarely articulated by the courts. However, in a recent North Dakota case, 81 the court expressly recognized these conflicting considerations when it stated:

If the principle of estoppel is applied too broadly it would accomplish a complete derogation of the Statute of Frauds and estoppel can then become the tool to accomplish the fraud. Conversely, too narrow an application of the principle of estoppel can permit the Statute of Frauds to be the tool to accomplish the fraud. 82

78. Id. at 543, 244 N.W.2d at 90. The court also stated that "mere breach or violation of an oral argument" or "mere denial of an agreement or refusal to perform it is not itself fraud . . . for which the court should give relief."

79. The court stated that promissory estoppel traditionally has been used "to supply the element of consideration." 196 Neb. at 544, 244 N.W.2d at 90. See also Kahn v. Cecelia Co., 40 F. Supp. 878, 879 (S.D.N.Y. 1941) wherein the court stated that promissory estoppel "has usually been resorted to as a substitute for consideration."


82. Id. at 812. That promissory estoppel has the potential for "swallowing" the defense of the Statute of Frauds has been noted by Gilmore who comments: "The most recent, and possibly the most important, development in the promissory estoppel or § 90 cases has been the suggestion that such contract-based defenses as the Statute of Frauds are not applicable when the estoppel (or reliance) doctrine is invoked as the ground for decision." GILMORE, supra note 23, at 90. Gilmore was referring to N.Litterio & Co., Inc. v. Glassman Constr. Co.,
Thus, when courts are confronted with these situations, the question is what elements are necessary to weight the balance in favor of one party or the other. Some courts, regardless of the type of estoppel which they are discussing, demand the historical requirement of a misrepresentation of present fact while others require a degree of reliance sufficient to warrant enforcement of the promise in order to avoid "unconscionable" injury. Finally, at least one jurisdiction absolutely precluded the applicability of estoppel in Statute of Frauds cases.

CONCLUSION

In *Klein*, the Nebraska Supreme Court clearly stated its position that the Statute of Frauds has continued vitality and is to be enforced. Thus, it found that the policies behind enforcing the statute outweigh the "reliance interest" of a disappointed promisee. However, the court did not absolutely preclude the use of promissory estoppel in cases involving oral agreements. Rather, it set three conditions for successful assertion of the doctrine: (1) the promisor must have made a promise or representation as to the intended abandonment of a legal right; (2) such promise must have induced action on the part of the promisee; and (3) the induced action must have been detrimental to the promisee. The buyer-promisor in *Klein* made no such showing and the court found that the buyer's "mere pleading" of reliance on the oral promise was not sufficient to enforce the promise.

*John Peebles—'78*

Inc., 319 F.2d 736 (D.C. Cir. 1963) where the court found no "contract" had been entered into and remanded the case for further proceedings on whether there might nevertheless be liability on promissory estoppel theory. One of the judges commented: "The issue as to the Statute of Frauds is no longer germant in light of our holding that no contract was created." 319 F.2d 736, 740 n.9. Gilmore found this to suggest that "defenses based on the statute of frauds or the contract statute of limitation or the parol evidence rule—all these being looked on as contract-based defenses—are no longer available if the underlying theory of liability—§ 90 or an analogue—is not contract theory at all." GILMORE, supra note 23, at 66.

83. See 66 MICH. L. REV., supra note 15, at 177 for discussion of courts' failure to distinguish between equitable and promissory estoppel.
84. See cases cited note 29 supra.
85. See case cited note 80 supra.
87. In a case subsequent to *Klein*, and containing similar facts, the Nebraska court reaffirmed this position on the basis of *Klein*. See Schott Grain Co. v. Rasmussen, 197 Neb. 267, 248 N.W.2d 42 (1976).
88. 196 Neb. at 544, 244 N.W.2d at 90.
89. Id. at 543, 244 N.W.2d at 90.