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Statute of Frauds--The Doctrine of Equitable Estoppel and the Statute of Frauds

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NOTES

STATUTE OF FRAUDS—The Doctrine of Equitable Estoppel and the Statute of Frauds

In 1677 the English Parliament enacted the first Statute of Frauds to prevent "many fraudulent practices, which are commonly endeavored to be upheld by perjury and subornation of perjury."[1] The trial system then existing in England was forced to depend upon unreliable juries, and relied upon few rules of evidence besides the rule treating parties to an action as incompetent witnesses.[2] Thus, in passing the Statute, Parliament sought to minimize the abuses possible under the trial system by providing that virtually no important contract would be enforceable unless reduced to writing.[3]

Despite the vast development of legal processes since the late seventeenth century, a law similar to the English Statute of Frauds may be found in every American jurisdiction.[4] The retention of the requirement of a writing 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

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1. 29 CAR. 2, c. 3 (1677).

2. Summers, *The Doctrine of Estoppel and the Statute of Frauds*, 79 U. PA. L. REV. 440, 441 (1931).

3. The basic provisions of the Statute are well summarized in *id.* at 440-41:

I. No interest in lands, except leases not exceeding three years, could be created or surrendered except by a writing.

II. Signed memoranda were required:
(a) to validate promises, of an executor or administrator to answer for damages out of his personal estate, or
(b) of a person to pay the debt of another;
(c) to enforce fulfillment of contracts made on consideration of marriage, or
(d) of executory contracts for the sale of lands; and
(e) to enforce performance of contracts that could not be executed within the year.

III. Creation or assignments of trusts in land were void unless evidenced by a writing, or were created by operation of law.

IV. Contracts for the sale of goods of a greater value than ten pounds were not enforceable unless the contracting parties signed a memorandum of the contract or partly performed it.

4. The Uniform Commercial Code also includes a requirement of a writing:

Section 2-201. Formal Requirements; Statute of Frauds.

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 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 a writing.

a basis for distinguishing contracts which are enforceable from those which are not.[5]

It has been hypothesized that had the original Statute of Frauds been strictly enforced from the time of its enactment, a strong custom would have developed of reducing all contracts within its scope to writing, and that thereby numerous frauds and perjuries could have been avoided.[6] The validity of this position has never been tested conclusively. Not only has the scope of the Statute gradually been narrowed by judicial construction,[7] but some jurisdictions have recognized exceptions to the requirements of the Statute which threaten drastically to reduce its impact.

Historically, the equitable doctrine of part performance was the first means adopted by the courts to circumvent the Statute. In fact, the idea that an oral contract for the sale of land can be "taken out of the Statute of Frauds"[8] by certain conduct on the part of the

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5. The respective importance of these functions are discussed at length in Fuller, *Consideration and Form*, 41 COLUM. L. REV. 799 (1941). Another defense of the requirement of a writing may be found in Llewellyn, *What Price Contract?—An Essay in Perspective*, 40 YALE L.J. 704, 746-48 (1931). Taking the contrary position are: Burdick, *A Statute for Promoting Fraud*, 16 COLUM. L. REV. 273 (1916); Corbin, *The Uniform Commercial Code—Sales; Should It Be Enacted?*, 59 YALE L.J. 821, 829 (1950); Summers, *supra* note 2, at 441-43; Willis, *The Statute of Frauds—A Legal Anachronism*, 3 IND. L.J. 427, 528 (1928).

6. Dissenting in Brewood v. Cook, 207 F.2d 439, 448 (D.C. Cir. 1953), Judge Prettyman adopts this view and quotes the following statement of Lord Redesdale with approval:

> [The Statute of Frauds] was made for the purpose of preventing perjuries and frauds, and nothing can be more manifest to any person who has been in the habit of practicing in the courts of equity, than that the relaxation of the statute has been the ground for much perjury and fraud. If the statute had been vigorously observed, the result would probably have been that few instances of parole agreements would have occurred; agreements would, from the necessity of the case, have been reduced to writing: whereas it is manifest that the decisions on the subject have opened a new door to fraud . . . . [A]nd I remember it was mentioned . . . as a common expression at the bar, that it had become a practice to "improve gentlemen out of their estates." It is therefore absolutely necessary for courts of equity to make a stand and not carry the decisions any further . . . .

Lindsay v. Lynch, 2 Sch. & Lef. 1, 5 (Ir. Ch. 1804).

7. Thus a promise to pay the debt of another has been construed to encompass only promises made to a creditor which do not benefit the promisor (RESTATEMENT OF CONTRACTS § 184 (1932); 3 S. WILLISTON, CONTRACTS § 452 (Jaeger ed. 1960)); a promise in consideration of marriage has been interpreted to exclude mutual promises to marry (RESTATEMENT, *supra* § 192; 3 S. WILLISTON, *supra* § 485); a promise not to be performed within one year means a promise not performable within one year (RESTATEMENT, *supra* § 198; 3 S. WILLISTON, *supra* § 495); a promise not to be performed within one year may be removed from the Statute of Frauds if one party has fully performed (RESTATEMENT, *supra* § 198; 3 S. WILLISTON, *supra* § 504); and the Statute will not be applied where all promises involved are fully performed (RESTATEMENT, *supra* § 219; 3 S. WILLISTON, *supra* § 528).

8. Though this phrase has been used in inumerable cases, Professor Corbin argues that it is not really accurate: "Part performance of a contract for the transfer of land does not take the case out of the statute; but it may be of such a character that it will take the statute out of the case." 2 A. CORBIN, CONTRACTS § 420, at 452 (1950).

vendee or vendor is as old as the Statute itself,[9] and has long been embodied in the law of the overwhelming majority of American jurisdictions.[10] Thus, today the doctrine of part performance presents no great controversy. However, perhaps because the part performance principle developed so early, the prerequisites for its application have become relatively fixed. First, the doctrine operates primarily[11] in the area of land-sale contracts.[12] Second, the conduct which is to constitute part performance must be "unequivocally referable" to the alleged oral agreement[13]—the act must be one which cannot readily be explained absent the existence of a contract.[14] Finally, since part performance is regarded as a purely equitable doctrine,[15] relief granted under it traditionally has been limited to specific performance, and if substantial justice can be achieved through a restitution remedy, part performance may not be available to enforce a contract in disregard of the Statute.[16]

Although the requirements for the application of part performance are fairly well defined, both courts and commentators are divided as to the theoretical basis of the doctrine. Some have explained the part performance exception on the theory that conduct which is "unequivocally referable" to an oral contract satisfactorily fulfills the evidentiary function that the Statute of Frauds was in

9. *See* Costigan, *The Date and Authorship of the Statute of Frauds*, 26 HARV. L. REV. 329, 344 (1913):

> [T]he statute's framers were thoroughly familiar with the part-performance problem, and the decisions which shortly after the Statute of Frauds settled the law that part-performance would make the oral contract for the sale of land enforceable in chancery, notwithstanding the statute are conclusive evidence that its framers never intended the statute to prevent the giving of equitable relief in part-performance cases.

10. Only Kentucky, Mississippi, North Carolina, and Tennessee have repudiated the part performance principle. *See* 2 A. CORBIN, *supra* note 8, § 443.

11. Though in recent years some courts have occasionally applied the part performance doctrine to oral agreements falling within the other clauses of the Statute, *see* 2 *id.* §§ 459, 465, in most states deviation from the land contract situation has not been common. *See* 3 S. WILLISTON, *supra* note 7, § 533.

12. *See* RESTATEMENT, *supra* note 7, § 197.

13. *See* Winslow v. Baltimore & O.R.R., 188 U.S. 646, 658 (1903); 2 A. CORBIN, *supra* note 8, § 430; 3 S. WILLISTON, *supra* note 7, § 533.

14. Regarding this point, Judge Cardozo said:

> Not every act of part performance will move a court of equity, though legal remedies are inadequate, to enforce an oral agreement affecting rights in land. There must be performance "unequivocally referable" to the agreement, performance which alone and without aid of words of promise is unintelligible or at least extraordinary, unless as an incident of ownership, assured, if not existing. . . . What is done must itself supply the key of what is promised. It is not sufficient that what is promised may give significance to what is done.

Burns v. McCormick, 233 N.Y. 230, 232, 135 N.E. 273 (1922). Common examples of conduct which meet this test are a vendee's taking possession of land and making valuable improvements or a vendor's conveying land. *See* 2 A. CORBIN, *supra* note 8, § 434.

15. *See* 2 *id.* § 422.

16. *See* 2 *id.* § 425, 427.

large part designed to perform.[17] Others, however, have maintained that part performance is based on the ancient equity doctrine of estoppel in pais, or equitable estoppel.[18] This doctrine provides that one who makes a representation of fact on which another justifiably relies to his detriment should not thereafter be permitted to deny the truth of his representation in order to assert rights against the relying party.[19]

Thus, under the label of part performance all jurisdictions may have long recognized what is in effect a closely circumscribed form of equitable estoppel as a limited exception to the Statute of Frauds. However, in recent years the doctrine of equitable estoppel in its own right has become increasingly significant as an exception to the Statute of Frauds. In fact, today some American jurisdictions apply the doctrine in a much more sweeping fashion in Statute of Frauds cases than was permissible even under normal equitable estoppel principles. In the past fifty years, the courts of a substantial minority of the states have relaxed the historical prerequisites[20] for the

17. For example, in Green v. Groves, 109 Ind. 519, 525, 10 N.E. 401, 404 (1887) the court stated: "The philosophical reason why a part performance will take a parole contract without [sic] the statute is that the acts constituting such a part performance, of themselves, are to a greater or lesser extent, evidence of the contract."

18. *See* cases cited in Annot., 101 A.L.R. 923, 935 n.53 (1936); F. POLLOCK, CONTRACTS 521-22 (Winfield ed. 1950). Professor Corbin sees little value in speculating about which philosophy underlies part performance since, under either theory, "the practical result is that the agreement is enforced." 2 A. CORBIN, *supra* note 8, § 421, at 454.

19. In the part performance context, the necessary representation would presumably be supplied by the defendant's oral promise to perform, although this is not, strictly speaking, a representation of fact. The reliance might be supplied by the plaintiff's performance of either part of the agreed exchange, or other acts of reliance —for example, entry into possession of land and making improvements thereon. Since part performance requires only this kind of reasonable reliance, the term "part performance" is misleading, and the fact that such reliance will suffice to bring the doctrine into play certainly indicates close kinship to the doctrine of equitable estoppel. A multitude of cases have held that the performance need not be a part of the duty undertaken by the plaintiff as a part of his exchange performance and that taking possession and making improvements will bring the doctrine into play. *See* 2 *id.* § 426.

20. Professor Pomeroy enumerated six elements that he felt must be established before an estoppel could be raised:

> 1. There must be conduct—acts, language, or silence—amounting to a representation or 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 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

application of equitable estoppel in the Statute of Frauds context. One fundamental change that these courts have effected is to eliminate the traditional[21] requirement that the reliance be upon a *misrepresentation of fact.*-Almost equally important, they have lessened the amount of injury that must be shown before the doctrine of equitable estoppel can operate. Thus, in these jurisdictions equitable estoppel in Statute of Frauds cases now rests on the broad principle that the law should not refuse to enforce an oral contract falling within the Statute when such refusal would cause "unconscionable injury" to a party who has justifiably relied on the other party's contractual promise. Since it has long been established that, despite its name, equitable estoppel is equally available in actions for damages at law as in suits for specific performance in equity,[22] this expanded doctrine allows plaintiffs to avoid the Statute in virtually all cases except those in which enforcement of the Statute would *not* produce an "unconscionable" result.[23]

The following situation is illustrative of one factual context in which a broad principle of equitable estoppel might be held to operate: *A*, a Michigan farmer, enters into an oral agreement whereby he contracts to participate in *B*'s five-year hog-leasing program in return for, among other things, *B*'s promise to take and dispose of *A*'s surplus stock. *A* makes a substantial investment to institute the leasing plan, but when he seeks to enforce *B*'s promise, *B* refuses to perform on the ground that the contract, being inca-

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> the worse; in other words, he must so act upon it that he would suffer a loss if he were compelled to surrender or forego or alter what he has done by reason of the first party being permitted to repudiate his conduct and assert rights inconsistent with it.

3 J. POMEROY, EQUITY JURISPRUDENCE § 805, at 191-92 (Symons ed. 1941). However, his effort, at least in the Statute of Frauds context, has had only a limited degree of success. *Compare* Ozier v. Haines, 411 Ill. 160, 103 N.E.2d 485 (1952) (adopting Pomeroy's tests) *with* Monarco v. Lo Greco, 35 Cal. 2d 621, 220 P.2d 737 (1950) (not requiring a representation of fact) *and* Hurst v. Thomas, 265 Ala. 398, 91 So. 2d 692 (1956) (requiring proof of actual fraud).

21. Originally, courts would only employ equitable estoppel in cases where *actual fraud* with its requirement of scienter had been proven. 3 J. POMEROY, *supra* note 20, §§ 802, 803; Summers, *supra* note 2, at 443-45. However, by the late nineteenth century it became generally accepted that a showing of misrepresentation would be sufficient. 3 J. POMEROY, *supra* §§ 803, 806, especially at 200-01.

22. *See* Dickerson v. Colgrove, 100 U.S. 578, 582-84 (1879); 3 J. POMEROY, *supra* note 20, § 802, at 181-84; 3 S. WILLISTON, *supra* note 7, § 533A, at 792. *But see* Magnat Corp. v. B & B Electroplating Co., 358 F.2d 794 (1st Cir. 1966); Goodwin v. Gillingham, 10 Wash. 2d 656, 117 P.2d 959 (1941).

23. Examples of cases in which the expanded doctrine would not be applicable would include those where the action is to obtain recovery for an expectation interest [*see, e.g.*, Bach v. Perkins, 223 F.2d 251 (9th Cir. 1955); Bonnear v. Bank of America, 84 Cal. App. 2d 107, 190 P.2d 307 (1948)], where the plaintiff's reliance is unjustifiable [*see, e.g.*, Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964)], or where satisfactory relief is available in restitution (*see, e.g.*, Morrison v. Land, 169 Cal. 580, 147 P. 259 (1915); Kobus v. San Diego Trust and Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (1959); S. WILLISTON, *supra* note 7, § 533A, at 809).

pable of performance within one year, is unenforceable under the Statute of Frauds.[24]

In this illustration it is clear that if the principle of equitable estoppel is applied to enforce the parties' oral agreement, it is being used in substantial derogation of the Statute of Frauds and the legislative policies presumably incorporated in it. It is not surprising, then, that courts have varied widely in their willingness to apply the doctrine broadly. Among the courts which have considered the issue, most appear to have decided to accept or reject this broad principle of equitable estoppel by making a conscious policy determination that "doing justice" in any particular case does, or does not, outweigh the general considerations which led the legislature to enact the Statute. A substantial minority, however, when confronted with the argument that equitable estoppel should preclude application of the Statute, have reached their results through reasoning which does not properly distinguish equitable estoppel from either the doctrine of part performance and or that of promissory estoppel. These courts have thus failed to make the fundamental policy determination which, it is submitted, is required by the issue with which they were presented.

The courts of California have been more willing than those of any other jurisdiction broadly to apply equitable estoppel in Statute of Frauds cases.[25] They clearly have done so with the intention of restricting the Statute's operation to those cases in which its application would not produce an "unfair" result. This policy determination, originally set forth in the 1909 landmark case of *Seymour v. Oelrichs*,[26] was strongly reaffirmed in 1950 in *Monarco v. Lo Greco*.[27] In the latter decision, the court announced two general standards for determining when an estoppel may properly be raised. It stated that a party will be estopped to plead the Statute of Frauds if *either* "unconscionable injury . . . [will] result from denying enforcement of the contract after one party has been induced by the other seriously to change his position in reliance on the contract"[28] *or* "unjust enrichment . . . [will] result if a party who has received

24. This situation is based directly on the case of *Oxley v. Ralston Purina Co.*, 349 F.2d 328 (6th Cir. 1965). For other recent cases in which variations of the problem are presented, *see, e.g.*, Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 S.2d 777 (Fla. Sup. Ct. 1966); Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250 (1964).

25. For two excellent discussions of the use of equitable estoppel in California, *see* Comment, *Equitable Estoppel and the Statute of Frauds in California*, 53 CALIF. L. REV. 590 (1965); Comment, *Part Performance, Estoppel, and the California Statute of Frauds*, 3 STAN. L. REV. 281 (1951).

26. 156 Cal. 782, 106 P. 88 (1909).

27. 35 Cal. 2d 621, 220 P.2d 737 (1950).

28. *Id.* at 623, 220 P.2d at 739.

the benefits of the other's performance is allowed to rely upon the statute."[29]

In the years following *Monarco*, the limits on the "unjust enrichment" standard have become fairly well established in California. It appears clear that where a restitution remedy would adequately reimburse a plaintiff, equitable estoppel will not bar an assertion of the Statute of Frauds as a defense to a suit on an oral agreement.[30]

The limits of the "unconscionable injury" standard are not, however, so well defined. The liberal interpretation that a court may give these words is seen clearly in *Goldstein v. McNeil*,[31] a case decided by a California district court of appeals. In this action, plaintiff, pursuant to an oral contract of sale, shipped a quantity of used cars to defendant. While the cars were still in transit, defendant gave notice that he would not accept them, and plaintiff was forced to negotiate a second sale on the open market, thereby incurring a substantial loss. When plaintiff sued on the oral contract, the court held that defendant was estopped to plead the Statute of Frauds and awarded full difference-money damages. It found that "unconscionable injury" would result if it refused to enforce the contract because plaintiff, in performing his part of the agreement, "missed a very high market existing around the time of the contract and was caught in a sharp slump."[32] Thus, the *Goldstein* court would presumably be quick to find "unconscionable injury" in a great many cases involving breaches of sales contracts, since such breaches are often occasioned by a significant change in price.

The *Goldstein* decision appears to represent the most extreme application ever given equitable estoppel in the Statute of Frauds context. However, the courts of at least seven other jurisdictions, although they might stop short of *Goldstein*, have apparently based their decision to apply the doctrine broadly on a genuine belief that the Statute of Frauds has largely outlived its usefulness.[33] Yet, other courts, in deciding that the estoppel principle bars a party from

29. *Id.* at 623-24, 220 P.2d at 740.

30. Kobus v. San Diego Trust & Sav. Bank, 172 Cal. App. 2d 574, 342 P.2d 468 (1959); Palmer v. Phillips, 123 Cal. App. 2d 291, 266 P.2d 850 (1954); Chahon v. Schneider, 117 Cal. App. 2d 334, 256 P.2d 54 (1953); Jirshick v. Farmers & Merchants Nat'l Bank, 107 Cal. App. 2d 405, 237 P.2d 49 (1951).

31. 122 Cal. App. 2d 608, 265 P.2d 113 (1954).

32. *Id.* at 612, 265 P.2d at 115.

33. Brewood v. Cook, 207 F.2d 439 (D.C. Cir. 1953); Waugh v. Lennard, 69 Ariz. 214, 211 P.2d 806 (1949); Boesiger v. Freer, 85 Idaho 551, 381 P.2d 802 (1963); Hamburger v. Hirsch, 212 S.W. 49 (Mo. Ct. App. 1919); B.F.C. Morris Co. v. Mason, 171 Okla. 589, 39 P.2d 1 (1935) (plaintiff losing on a different issue); Ross v. Midelburg, 129 W. Va. 851, 42 S.E.2d 185 (1947); Vogel v. Shaw, 42 Wyo. 333, 294 P. 687 (1930). In Oxley v. Ralston Purina Co., 349 F.2d 328 (6th Cir. 1965), the Sixth Circuit decided that if confronted by this problem this is the way the Supreme Court of Michigan would resolve the conflict between the Statute of Frauds and equitable estoppel.

pleading the Statute, have done so on the basis of such confused reasoning that any policy determination they may have made as to the Statute's utility is left almost totally obscured. The primary source of their confusion lies in their failure to distinguish properly between the doctrines of *equitable* and *promissory estoppel.*

The position that promissory estoppel can somehow operate to preclude a party from asserting a Statute of Frauds defense has been adopted in five jurisdictions[34] and has been argued but rejected in a number of others.[35] Several of the courts that have accepted this theory seem to have felt obliged to do so because the doctrine of promissory estoppel was well established in their respective states.[36] It is here submitted that they were in no way so bound.

The principle of promissory estoppel received its classical formulation in the *Restatement of Contracts,* section 90:

> 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.

While nothing in the language of section 90 seems to preclude applying promissory estoppel in the usual Statute of Frauds situation, the history of the section's use and the context in which it appears in the *Restatement* clearly indicate that section 90 cannot properly be cited as authority for applying promissory estoppel in Statute of Frauds cases.[37] As originally conceived, section 90 was probably intended to make gratuitous promises enforceable after the promisee had acted in reliance in a way which the promisor should have fore-

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34. Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. Alaska 1954); Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954); *In re* Field's Estate, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Surr. Ct. 1958); Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964); Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956). In the last two cases cited, the courts held in favor of the defendants but only because plaintiffs had failed to prove that they had relied to their substantial detriment.

35. Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 S.2d 777 (Fla. Sup. Ct. 1966); Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250 (1964).

36. For example, in *In re* Field's Estate, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Surr. Ct. 1958) the court enforced an oral contract that was not performable within one year, holding in the alternative that "the proven reliance upon the oral promise by the university under these facts would *require* the invocation of promissory estoppel, preventing decedent or his privies from raising a defense based on the Statute of Frauds." *Id.* at 433, 172 N.Y.S.2d at 747 (emphasis added).

37. For a thorough examination of the development and uses of promissory estoppel, *see* Boyer, *Promissory Estoppel: Principle From Precedents,* 50 MICH. L. REV. 639, 873 (1952); Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine,* 98 U. PA. L. REV. 459 (1950). It is also significant that although *Restatement* § 90 has been substantially expanded in RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2 1965), reference to the Statute of Frauds problem is conspicuously absent.

seen.[38] In practice, however, courts have applied the section more broadly, using it also in connection with contract formation to justify treating some contractual offers as irrevocable.[39] Thus, when an offeror should have foreseen that an offeree might rely on his offer prior to acceptance, courts have invoked the section to prevent the offeror from successfully pleading the absence of formal acceptance or consideration to defeat the contractual claim of the offeree.

That section 90 has been applied to convert an offer and reliance thereon into what is in effect an option contract provides no precedent for using promissory estoppel to preclude a Statute of Frauds defense. The difference between the two situations is dramatized by the following hypothetical: *A* orally offers to sell *B* his law books for $600,[40] and *B* orally accepts. The contract is never reduced to writing, but *B*, not realizing that a writing is required and in reliance on *A*'s promise to perform, signs a contract whereby he agrees to resell the books to *C*. The price of law books then rises sharply, and *A* refuses to perform on the ground that his contract with *B* is unenforceable because of its failure to meet the requirements of the Statute of Frauds. In this situation the court is not asked to pass on the existence of a contract, for all the elements of contract formation are present. The question instead is whether the policies embodied in the Statute preclude enforcement of the contract, which admittedly exists.

Not only does the history of section 90 suggest that promissory estoppel is not proper authority for enforcing the contract in such a case, but it is significant that the *Restatement* has sought to deal with the Statute of Frauds situation under an entirely different heading. Section 178, comment *f* states:

> Though there has been no satisfaction of the Statute, an estoppel may preclude objection on that ground . . . . A misrepresentation that there has been such satisfaction if substantial action is taken in reliance on the representation, precludes proof by the party who made the representation that it was false; and a promise to make a memorandum, if similarly relied on, may give rise to an effective

38. RESTATEMENT OF CONTRACTS § 90, Illustrations 1-3 (1932).

39. *See, e.g.*, Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958); *cf.* Northwestern Eng'r v. Ellerman, 69 S.D. 397, 10 N.W.2d 879 (1943). *But see* James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933). In this regard, *see* RESTATEMENT (SECOND) OF CONTRACTS, § 89(b)(2) (Tentative Draft No. 2 1965):

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

In addition, *see* comment *e* to § 89(b)(2), and the Reporter's Note to comment *e*.

40. The Uniform Commercial Code, which has been adopted in forty-nine states, only requires a writing for contracts for the sale of goods for $500 or more. UNIFORM COMMERCIAL CODE § 2-201(1), quoted in note 4 *supra*.

promissory estoppel if the Statute would otherwise operate to defraud.

The principle of estoppel set forth above is considerably more limited in scope than that contained in section 90. By section 178, the Statute of Frauds defense is only precluded if there has been (1) a misrepresentation that the Statute's requirements have already been complied with, or (2) a promise that they will be met.[41] The first of these conditions posits a situation in which *equitable estoppel* is clearly appropriate by the traditional standards, for it includes a misrepresentation of fact and justifiable reliance thereon. The second condition, while expressly referring to *promissory estoppel,* makes much different use of the doctrine than do the courts. It requires not only that the promise giving rise to the estoppel go to the Statute of Frauds, but also that *this promise,* rather than merely the promise to perform, be relied upon by the plaintiff.

The implicit rationale for the second part of comment *f* seems to be that promissory estoppel may act as a basis for enforcing the promise to reduce an agreement to writing, a promise which, not being part of a part of a bilateral contract, would otherwise be unenforceable. Significantly, none of the five courts that have applied promissory estoppel in derogation of the Statute of Frauds has rested its decisions on this analysis. Indeed only two[42] have required a promise to execute a writing at all. The other three[43] appear to have adopted the view that promissory estoppel applies when the reliance is merely on the promise to perform the oral agreement itself. This approach might be justifiable if motivated by a policy determination to limit the Statute of Frauds. It may well be, however, that these five courts have joined the group that broadly applies an estoppel principle in the Statute of Frauds area solely because they mistakenly believed that the doctrine of promissory estoppel required this result.[44]

Thus, a substantial minority of jurisdictions have provided, either by a conscious policy determination or by a conceptual confusion, a broad avenue of escape from the provisions of the Statute of Frauds. The remaining American courts that have dealt with the relation between equitable estoppel and the Statute of Frauds have

41. *See* 3 S. WILLISTON, *supra* note 7, § 533A where these requirements are also imposed.

42. Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. Alaska 1954); Easton v. Wycoff, 4 Utah 2d 386, 295 P.2d 332 (1956).

43. Miller v. Lawlor, 245 Iowa 1144, 66 N.W.2d 267 (1954); *In re* Field's Estate, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (Surr. Ct. 1958); Aubrey v. Workman, 384 S.W.2d 389 (Tex. Civ. App. 1964).

44. In this regard it is noteworthy that the California courts have only once made use of promissory estoppel to avoid the effect of the Statute of Frauds [Sessions v. Southern California Edison Co., 47 Cal. App. 2d 611, 118 P.2d 935 (1947)], and they have been severely criticized for doing so [Comment, 3 STAN. L. REV. 281, 294 (1951)].

consistently refused to extend the estoppel doctrine to the point where it would restrict seriously the operation of the Statute. Indeed some have limited application of the doctrine in this context further than history would seem to justify.[45] Moreover, as was found to be the case in the states that broadly apply equitable estoppel, the results encountered here seem only sometimes to be grounded on a fundamental policy decision to maintain the integrity of the Statute of Frauds; frequently, a court's refusal to apply equitable estoppel appears to be based upon a misunderstanding of the nature of the doctrine and the requisites for its use.

Among the states whose decisions effectuate the policies of the Statute, only Pennsylvania has categorically rejected the principle of equitable estoppel as a means of enforcing oral contracts falling within the Statute's scope.[46] In most other of these jurisdictions, equitable estoppel has expressly been accepted, but not in its extended form. The Illinois Supreme Court's decision in *Ozier v. Haines*[47] is typical. In this case, the court held that in the absence of a misrepresentation of fact defendant could not be estopped from pleading the Statute of Frauds, although it realized this result might work hardship in a particular case. Thus, the court stated: "It is true that harsh results, or moral fraud . . . may occur where one has changed his position in reliance on the oral promise of another, but it is a result which is invited and risked when the agreement is not reduced to writing in the manner prescribed by law."[48]

In at least two states,[49] the courts have decided that even the normal principles of equitable estoppel should not operate to bar a party from asserting a Statute of Frauds defense to an oral contract; they require proof that the defendant was guilty of *actual fraud* before they estop him from raising the Statute as a defense. At one time, it was essential that a party be able to show actual fraud in order to rely on equitable estoppel; but by the end of the nineteenth

45. *See* notes 51, 52, & 54 *infra*, and accompanying text.

46. Polka v. May, 383 Pa. 80, 118 A.2d 154 (1955). Although there does not appear to have been any detrimental reliance in this particular case, the court did not ground its decision on this fact. Rather it made the sweeping proclamation that "the principle of estoppel may not be invoked against the operation of the statute of frauds." *Id.* at 84, 118 A.2d at 156 (footnotes omitted). This blanket statement was later reaffirmed in Beers v. Pusey, 389 Pa. 117, 132 A.2d 346 (1957), but once again it does not seem that plaintiff had relied to his detriment.

47. 411 Ill. 160, 103 N.E.2d 485 (1952). This case has recently been followed in Sinclair v. Sullivan Chevrolet Co., 45 Ill. App. 2d 10, 195 N.E.2d 250 (1964).

48. 411 Ill. 160, 164-65, 103 N.E.2d 485, 488 (1952). For similar statements, *see, e.g.*, Tanenbaum v. Biscayne Osteopathic Hosp., Inc., 190 So. 2d 777 (Fla. Sup. Ct. 1966); Purcell v. Campbell, 261 Ky. 644, 88 S.W.2d 670 (1935); Nehls v. Williams Stock Farming Co., 43 Nev. 253, 184 P. 212, *reaff'd* 185 P. 563 (1919); Kooba v. Jacobitti, 59 N.J. Super. 496, 158 A.2d 194 (App. Div. 1960); Treadwell v. Henderson, 58 N.M. 230, 269 P.2d 1108 (1954).

49. Hurst v. Thomas, 265 Ala. 398, 91 S.2d 692 (1956); Newman v. Newman, 103 Ohio St. 230, 133 N.E. 70 (1921).

century a mere showing of a misrepresentation of fact was deemed sufficient.[50] That these courts have reverted to the stricter test in the Statute of Frauds context reflects their respect for the legislature's policy determination in enacting the Statute.

As has been suggested, the decisions of a number of courts which have severely limited the estoppel principle fail to reflect any conscious policy determination to defer to the Statute. In some jurisdictions this may be explained by the courts' apparent confusion as to the scope of the equitable estoppel doctrine and the prerequisites for its application. Thus, in Massachusetts[51] and Washington[52] the courts have refused to apply the doctrine in actions at law even though elsewhere it has long been accepted[53] that the doctrine, in spite of its name, is in no way exclusively equitable in character. Similarly, it appears to be the law in Georgia[54] that equitable estoppel can only operate against a defendant who has benefited from plaintiff's reliance, although elsewhere such a requirement has never been among the prerequisites of the doctrine's use.[55] These peculiar restrictions on the equitable estoppel principle may give these courts an easy way of avoiding the policy conflict posed by a broad application of the equitable estoppel principle in the Statute of Frauds context.

The most important source of confusion among the courts which limit the operation of the doctrine in Statute of Frauds cases is the failure to distinguish between equitable estoppel and part performance. Although both these doctrines may well be grounded upon the same theoretical basis,[56] part performance has been carefully limited and may be invoked only when certain well defined prerequisites are met, whereas equitable estoppel—at least in the form adopted in California and the other states following its lead—is limited by little more than a general notion of fairness. As noted earlier, while part performance operates mainly in land contract situations, requires proof that plaintiff's reliance "unequivocally refer" to the oral contract, and is rarely applied in actions at law,[57] equitable estoppel is ordinarily not restricted in any of these ways.[58] Thus, when a court is asked to apply equitable estoppel to enforce a contract which is otherwise unenforceable because of the Statute, it should recognize that the doctrine invoked poses a much more

50. *See* note 21 *supra*.
51. Magnat Corp. v. B & B Electroplating Co., 358 F.2d 794 (1st Cir. 1966).
52. Goodwin v. Gillingham, 10 Wash. 2d 656, 117 P.2d 959 (1941).
53. *See* note 22 *supra* and accompanying text.
54. Cofer v. Wofford Oil Co., 85 Ga. App. 444, 450, 69 S.E.2d 674, 678 (1952).
55. *See* note 20 *supra*.
56. *See* note 18 *supra* and accompanying text.
57. *See* note 11-16 *supra* and accompanying text.
58. *See* 3 S. WILLISTON, CONTRACTS § 533A, at 787-803 (Jaeger ed. 1960); notes 22-23 *supra*.

serious threat to the Statute of Frauds than does part performance. Nevertheless, in at least four states[59] the terms equitable estoppel and part performance have been used virtually interchangeably, and the stricter requirements of part performance have been imposed in all cases. In two other jurisdictions dissenting judges have espoused this position.[60] This misunderstanding inevitably leads to a failure to make the policy choice demanded by the equitable estoppel argument.

Conclusion

So many commentators have debated whether the Statute of Frauds is appropriate in the context of modern law[61] that an extensive theoretical re-examination of the problem here would result in few, if any, novel conclusions. On the one hand, it can be argued that the reliability of the judicial fact determination process has improved to such a degree that the requirement of a writing results in more harm than good. Indeed, there is a certain amount of statistical data that tends to support this view.[62] On the other hand, a twofold answer can be made: first, the Statute of Frauds continues to perform useful evidentiary, cautionary, and channeling functions; and second, the legislature alone has the authority to decree that justice can best be served by the Statute's abrogation.

A majority of courts have faced the problem posed by the inconsistency between the policies of the Statute of Frauds and those of the doctrine of equitable estoppel, and have made a conscious determination either to favor the Statute or the estoppel principle. A substantial minority, however, have not done so, but have made the decision to effectuate or limit the Statute of Frauds by relying on doctrines and precedent of little relevance to the issue they were asked to face. Thus, in some states, litigants may confront the unenviable task of interpreting law that is in a state of nearly impossible confusion. It is to be hoped that the courts in these states will avail themselves of the first opportunity to clarify their positions on the basic policy issue that underlies the relationship between the doctrine of equitable estoppel and the Statute of Frauds.

59. Wolfe v. Wallingford Bank & Trust Co., 124 Conn. 507, 515, 1 A.2d 146, 150 (1938) (holding that the only difference between part performance and equitable estoppel is that the former operates only at equity while the latter is available in actions for damages at law); Smith v. Portland Fed. Sav. & Loan Ass'n, 207 Ore. 546, 296 P.2d 481, *modified* 207 Ore. 546, 298 P.2d 185 (1956); Federal Land Bank v. Matson, 68 S.D. 538, 541-42, 5 N.W.2d 314, 315 (1942); Beranek v. Gohr, 260 Wis. 282, 287, 50 N.W.2d 459, 462 (1951).

60. Brewood v. Cook, 207 F.2d 439, 443-48 (D.C. Cir. 1953); Treadwell v. Henderson, 58 N.M. 230, 241-45, 269 P.2d 1108, 1115-17 (1954).

61. *See* note 5 supra.

62. *See* Summers, *The Doctrine of Estoppel and the Statute of Frauds*, 79 U. Pa. L. Rev. 440, 442 (1931).