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Comments

CONTRACTS—PROMISSORY ESTOPPEL—EMPLOYMENT CONTRACTS FOR INDEFINITE DURATION

INTRODUCTION

Morsinkhoff v. De Luxe Laundry & Dry Cleaning Co.,¹ a recent Missouri case, involved the problem of employment contracts for an indefinite duration. The plaintiff, a plant supervisor and engineer earning \$7,500 a year, obtained an interview with the individual defendants, Samuel Paul and his father, officers of defendant corporation, at defendant's plant on April 29, 1955. The interview, plaintiff claimed, resulted in an oral contract whereby he was to work for defendant beginning June 6. The alleged salary was to be \$200 a week, which defendant said would amount to \$10,000 a year. On May 1, plaintiff gave notice of termination to his present employer. On May 3, a conversation with defendant indicated no change in the arrangements, but on May 11, plaintiff was notified by the employment agency through which he had secured the interview that the employment was no longer open, and was thereby obliged to accept another position at \$6,500 a year. Plaintiff brought suit on the oral contract; the lower court entered a \$1280 judgment for the plaintiff.² On appeal, the judgment was reversed by the Kansas City Court of Appeals, which held that the contract was for an indefinite period, terminable at will by either party without liability. The court also said that if the contract was for one year it was unenforceable under the Statute of Frauds as a contract not to be performed within a year of its making.³

1. 344 S.W.2d 639 (K.C. Ct. App. 1961).

2. The judgment was for the employment bonus lost by plaintiff because he resigned his job in the middle of the year and for one month's salary while he was out of work.

3. Where the parties have reached an oral agreement of employment omitting the term of the employment, some courts will construe the contract to run for the period of compensation. See *infra* note 10 and accompanying text. This construction may place the contract among those not to be performed within one year, enforcement of which would seemingly be barred by the Statute of Frauds. However, there is authority for the position that the contract may be withdrawn from the operation of the statute. One authority asserts that there are many cases where a plaintiff may have so far changed his position that there would be a moral fraud committed unless the contract is enforced, and that there should be no difference between moral fraud and the legal fraud for which equity courts have always given relief. Summers, *The Doctrine of Estoppel Applied to the Statute of Frauds*, 79 U. PA. L. REV. 440 (1931).

The courts often say they will not allow the statute to be used to perpetrate a fraud. *E.g.*, *Finlay v. Swirsky*, 103 Conn. 624, 131 Atl. 420 (1925). In order to prevent fraud some courts have applied the doctrine of promissory estoppel to this type of case. See, *e.g.*, *Brewood v. Cook*, 207 F.2d 439 (D.C. Cir. 1953); *Fibre-*

The agreement was an oral bilateral contract whereby plaintiff promised to work for defendant in exchange for defendant's promise to pay for the services rendered. Clearly all the necessary elements of a binding agreement were present, but the major question for the court concerned the length of the agreement. Obviously the parties meant the employment to have some substantial duration, but neither necessarily meant it to be permanent in the usual sense of the word, and the court was faced with the problem of interpreting a contract which was silent as to duration of obligation.

The basic problem involved is not new to Anglo-American law; indeed, it has probably existed in one form or another for as long as men have sought to create the master-servant, employer-employee relationship. Within the last one hundred years, however, the development of new legal theories has forced several shifts in the judicial approach to the problem. To adequately justify or criticize the result reached in *Morsinkhoff*, an examination of these approaches seems necessary. With that end in view, this article will attempt to set forth the various solutions which might be applied, and to reach thereby a conclusion as to the soundness of the decision in *Morsinkhoff*.

I. VIEWS ON EMPLOYMENT CONTRACTS

Courts have taken three different approaches in interpreting contracts for "permanent employment" or employment of an indefinite duration.⁴ These three

board Prods., Inc. v. Townsend, 202 F.2d 180 (9th Cir. 1953); Wolfe v. Wallingford Bank & Trust Co., 124 Conn. 507, 1 A.2d 146 (1938); Meads v. Stott, 193 Ore. 509, 238 P.2d 236 (1951). See generally 3 WILLISTON, CONTRACTS § 533A (3d ed. 1960); 49 AM. JUR. *Statute of Frauds* § 581 (1943); Summers, *supra*. The Missouri Supreme Court has said that the doctrine of estoppel is as old as the Statute of Frauds and as such is a part of the common law of the State. Therefore it is not inconsistent with either that one may work a modification of the other. Taylor v. Zepp, 14 Mo. 482 (1851).

The doctrine of promissory estoppel is discussed in another context in a later part of this article. *Infra* Section III. However, it would appear that the facts in *Morsinkhoff* might justify application of the doctrine to remove the contract from the operation of the Statute of Frauds. Apparently overlooking this possibility, the court in *Morsinkhoff*, by way of dictum, asserted that the contract was unenforceable under the statute. But in Alaska Airlines, Inc. v. Stephenson, 217 F.2d 295 (9th Cir. 1954), it was held that promissory estoppel was applicable where plaintiff had given up another job under which he had seniority rights and moved to Alaska on the basis of an oral contract for two years. See also Seymour v. Oelrichs, 156 Cal. 782, 106 Pac. 88 (1909). It should be noted, though, that the doctrine has also been rejected as a means of taking a contract out of the statute under facts similar to the main case. Kahn v. Cecella Co., 40 F. Supp. 878 (S.D.N.Y. 1941). Another court has stated that it would be possible to apply the doctrine in this area, but found that moving from California and leasing a house was not a sufficient detriment to satisfy the statute. Kooba v. Jacobitti, 59 N.J. Super. 496, 158 A.2d 194 (App. Div. 1960).

For the most complete step-by-step development of the doctrine in a single state see Sessions v. So. California Edison Co., 45 Cal. App.2d 611, 118 P.2d 935 (Dist. Ct. App. 1941); Wilk v. Vincill, 30 Cal.2d 104, 180 P.2d 351 (1947); Le Blond v. Wolfe, 83 Cal. App.2d 282, 188 P.2d 278 (Dist. Ct. App. 1948).

4. This problem arises in one of two ways: (a) Either the hiring clause of a written contract is indefinite as to the duration of the employment or simply states

views will, for ease of reference, be called the English view, the Williston view and the American view.⁵

A. *The English Rule*

The English view, that of the original common law, was that any employment contract which was indefinite as to duration would be considered a hiring for one year.⁶ This was the rule in all English and American common law jurisdictions until the middle of the Nineteenth Century,⁷ when the newer American view became prevalent in this country; it is still followed in a few American jurisdictions.⁸ However, the original doctrine has been modified in some states⁹ so that the employment is held to correspond to the period of the compensation.¹⁰ Thus, in *Adams v. Stewart*,¹¹ where the contract provided for a yearly salary paid monthly, the court found a contract for a year.¹²

B. *The Williston Approach*

The second view of contracts for "permanent employment" is the Williston view.¹³ Professor Williston has argued that "permanent employment" means employment which is to last as long as the employee is able to perform his work properly and as long as the employer remains in the same business. This position

the employment is to be permanent; or (b) the contract is oral, as is the contract in the main case, and oral testimony is required for proof of duration.

5. As these views are all well established, they will only be outlined briefly, and reference will be made to cases and texts where the subject is treated more fully. It should also be noted that the courts do *not* distinguish between the contracts claiming permanent employment and those which are simply indefinite as to their duration. Annot., 35 A.L.R. 1432 (1925); 15 N.C.L. REV. 276 (1937). See generally Annots., 135 A.L.R. 646 (1941), 35 A.L.R. 1432 (1925).

6. Annots., 161 A.L.R. 708 (1946), 100 A.L.R. 835 (1936), 11 A.L.R. 470 (1921); 1 LABATT, MASTER AND SERVANT § 156 (2d ed. 1913).

7. Labatt indicates that Blackstone based this rule upon an equitable principle which provided that a master should have the services of the servant, and the servant the opportunity to work, for a full revolution of the seasons. 1 LABATT, *op. cit. supra* note 6. Labatt himself, however, attributed the rule to the practice of generalizing certain early statutes to conform with the common usage of the times. *Ibid.*

8. Annots., 161 A.L.R. 699 (1946), 100 A.L.R. 835 (1936), 11 A.L.R. 471 (1921).

9. Annots., 100 A.L.R. 835 (1936), 11 A.L.R. 471 (1921).

10. England and the Commonwealth countries now hold these contracts terminable upon reasonable notice, but give great weight to the period of compensation in determining reasonableness. 1 WILLISTON, CONTRACTS § 39 (3rd ed. 1957); Annot., 161 A.L.R. 707 (1946). For the early development of the doctrine in the Commonwealth, see 1 LABATT, *op. cit. supra* note 6, § 158.

11. 228 Ala. 194, 153 So. 401 (1934).

12. *Accord*, Moline Lumber Co. v. Harrison, 128 Ark. 260, 194 S.W. 25 (1917); Southwell v. Parker Plow Co., 234 Mich. 292, 207 N.W. 873 (1926); Masonite Corp. v. Handshoe, 208 Miss. 166, 44 So. 2d 41 (1950); Dennis v. Thermoid Co., 128 N.J.L. 303, 25 A.2d 886 (Ct. Err. & App. 1942); Godson v. MacFadden, 162 Tenn. 528, 39 S.W.2d 287 (1931); City of San Antonio v. Condie, 329 S.W.2d 947 (Tex. Civ. App. 1959) (hiring for a month).

13. 1 WILLISTON, *op. cit. supra* note 3, § 39.

has not gained wide acceptance in the United States, and, where adopted, usually involves special technical services or the reduction of competition, whereby the promisor agrees to employ the promisee if the promisee will close his competing business or leave previous employment with a competitor.¹⁴ The facts of the main case do not lend themselves to this interpretation.

C. *The American Rule*

The so-called American view of employment contracts of indefinite duration is that they are terminable at the will of either party, without cause and without liability on the part of the terminator, unless a specific intent of the parties to the contrary is shown.¹⁵ This rule is followed in thirty-two states,¹⁶ Missouri included.¹⁷ Although its origins are obscure,¹⁸ the rule seems to have begun its development during the Nineteenth Century. However, irrespective of its origins, the rule does exist today, and in most cases is held to be a rule of law and not merely a rebuttable presumption. Since the higher the position, the more probable it becomes that the parties contemplated a considerable period,¹⁹ this often results in situations where the parties' intent is disregarded, and a result reached which the parties never contemplated.²⁰

While a few courts still seek to discover intention and apply it, most have adopted the rule that presence or absence of a second consideration is conclusive of this intent. Therefore, a contract, in order not to be terminable at will, must have two considerations, one for the contract and one to give the character of

14. *E.g.*, *Roxana Petroleum Co. v. Rice*, 109 Okla. 161, 235 Pac. 502 (1924); *Kirkley v. F. H. Roberts Co.*, 268 Mass. 246, 167 N.E. 289 (1929); *Carnig v. Carr*, 167 Mass. 544, 46 N.E. 117 (1897). See generally, Annot., 135 A.L.R. 646 (1941).

15. 1 LABATT, *op. cit. supra* note 6, §§ 159-160; 1 MECHEM, AGENCY § 592 (2d ed. 1914); 26 *Cyc. Master and Servant* 972-76 (1907); 18 R.C.L. *Master and Servant* §§ 19-20 (1917); Annots., 161 A.L.R. 709 (1946), 100 A.L.R. 835 (1936), 11 A.L.R. 470 (1921).

16. 56 C.J.S. *Master and Servant* § 31 (1948).

17. *Culver v. Kurn*, 354 Mo. 1158, 193 S.W.2d 602 (1946).

18. Labatt attributes the rule to the social and economic conditions in the United States, which made the English rule seem out of place. 1 LABATT, *op. cit. supra* note 6, § 160, at 519. Another author has expressed a different view, stating:

The source of the rule, that indefinite employment contracts are terminable at will, can be traced to a statement made by an early American text writer [WOOD, MASTER AND SERVANT § 136 (2d ed. 1886)]. Citing no authority for his view, he says that such a contract is prima facie terminable at will. This prima facie terminability by reason of the difficulty of establishing sufficient evidence to overcome it has the force of a rule of law.

15 N.C.L. REV. 276, 277 (1937).

19. The main case gives an excellent example of this statement. The intent of the parties was in no way considered. If it had been, the fact that the position was of a supervisory nature and that the plaintiff gave up a valuable job with a bonus would seem to show that both parties had the intent that the job was to be for a substantial period, and certainly *not* terminable before actual performance started.

20. 1 LABATT, *op. cit. supra* note 6, § 160. See also RESTATEMENT (SECOND), AGENCY § 442, comment *b* (1957).

permanency.²¹ Independent or additional consideration serves to turn into constant, steady or even lifetime employments, contracts of hire which otherwise would be terminable at will by either party.²²

This test of additional consideration originally was devised as an indication of intention.²³ However, it has now replaced the search for intent in most states and in fact is often applied to defeat it, inasmuch as the additional consideration is held to be conclusive of intent.²⁴ Two states, at least, have not been led astray, and still look for the intent of the parties, regarding any additional consideration as only a manifestation thereof;²⁵ but Missouri is among those which *require* the additional consideration.²⁶

Since Missouri and most other states do require additional consideration, it seems advisable to turn at this point to a more detailed examination of that element.

II. ADDITIONAL CONSIDERATION UNDER THE AMERICAN VIEW

Courts have held many types of consideration sufficient to constitute "additional consideration," including the revealing of a secret process,²⁷ mutual convenience,²⁸ and the release of a tort claim against the employer.²⁹ In all these cases,

21. *Eckhart v. Plastic Film Corp.*, 129 F. Supp. 277 (D. Conn. 1955); *Alabama Mills v. Smith*, 237 Ala. 296, 186 So. 699 (1939); *Ruinello v. Murray*, 36 Cal. 2d 722, 227 P.2d 251 (1951); *Stone v. Burke*, 110 Cal. App.2d 820, 244 P.2d 51 (Dist. Ct. App. 1952); *Fisher v. Jackson*, 142 Conn. 734, 118 A.2d 316 (1955); *Edwards v. Kentucky Util. Co.*, 286 Ky. 341, 150 S.W.2d 916 (1941); *Lynas v. Maxwell Farms*, 279 Mich. 684, 273 N.W. 315 (1937); *Skagerberg v. Blandin Paper Co.*, 197 Minn. 291, 266 N.W. 872 (1936); *Producer's Gin Ass'n (AAL) v. Beck*, 215 Miss. 263, 60 So. 2d 642 (1952); *Malever v. Kay Jewelry*, 223 N.C. 148, 25 S.E.2d 436 (1943); *Orsini v. Trojan Steel Corp.*, 219 S.C. 272, 64 S.E.2d 878 (1951); *Savage v. Spur Distrib. Co., Inc.*, 33 Tenn. App. 27, 228 S.W.2d 122 (1949); 56 C.J.S. *Master and Servant* § 31 (1948); RESTATEMENT (SECOND), AGENCY § 442, comments *a* and *b*; Annot., 135 A.L.R. 659 (1941).

22. *Shealy v. Fowler*, 182 S.C. 81, 188 S.E. 499 (1936).

23. *Savarese v. Pyrene Mfg. Co.*, 9 N.J. 595, 89 A.2d 237 (1952); *Eilen v. Tappin's Inc.*, 16 N.J. Super. 53, 83 A.2d 817 (Super. Ct. L. 1951); 25 TEMP. L. Q. 495 (1952).

24. 25 TEMP. L. Q. 495 (1952).

25. *Abbott v. Arkansas Util. Co.*, 165 F.2d 339 (8th Cir. 1948) (The court held that in Arkansas all that is necessary is mutual promises.); *McManigal v. Hiatt*, 240 Iowa 541, 36 N.W.2d 651 (1949). But *cf.* *Lewis v. Minnesota Mut. Life Ins. Co.*, 240 Iowa 1249, 37 N.W.2d 316 (1949) (four judges dissenting), apparently requiring double consideration. However, two other recent Iowa cases, *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W.2d 267 (1954), and *Thompson v. Miller*, 251 Iowa 324, 100 N.W.2d 410 (1960), indicate a swing back toward requiring only the intent of the parties. For a discussion of the present state of the law in Iowa, see 47 Iowa L. Rev. 725 (1962).

26. *Schonwald v. F. Burkart Mfg. Co.*, 356 Mo. 435, 202 S.W.2d 7 (1947); *Fullington v. Ozark Poultry Supply Co.*, 327 Mo. 1167, 39 S.W.2d 780 (1931).

27. *Schonwald v. F. Burkart Mfg. Co.*, *supra* note 26; *Beck v. Walkers*, 24 Pa. County Ct. 403 (1897).

28. *Producer's Gin Ass'n v. Beck*, *supra* note 21.

29. *Eggers v. Armour & Co.*, 129 F.2d 729 (8th Cir. 1942); *Brighton v. Lake Shore & M. S. Ry. Co.*, 112 Mich. 217, 70 N.W. 432 (1897); *Texas Cent. Ry. Co. v. Eldredge*, 155 S.W. 1010 (Tex. Civ. App. 1913).

the employee has suffered a detriment and the employer has gained some benefit. A few courts have held that detriment to the promisee alone is sufficient consideration,³⁰ following Williston's view of consideration.³¹ Partly because of the split by the courts over the matter of whether a simple detriment without benefit to the promisor is sufficient consideration for a contract itself, the courts have split in deciding cases with facts similar to *Morsinkhoff* where the employee has given up previous employment.³²

In support of the contention that the giving up of employment is sufficient consideration to prevent an employment contract from being terminable at will is the *Restatement of Agency*.³³ The period of the contract is held to be that of the compensation period if the employee gives additional consideration, the employment is of such a nature that a temporary job is not likely,³⁴ or the employer has notice that the employee has made an important change of position.³⁵

Following the lead of the *Restatement*, several courts have held the surrender of employment to be sufficient additional consideration. In *Fletcher v. Agar Mfg. Corp.*,³⁶ decided by a Missouri federal district court, the plaintiff was working for a competing company, and the defendant bargained with him to surrender this employment and to accept employment with the defendant. The court, holding the contract enforceable as one for permanent employment, found that this surrendering of employment was part of the consideration bargained for and was sufficient to satisfy the additional consideration doctrine.

The Alabama Supreme Court has ruled that if the employer knows that the person being employed is then employed, and that he is giving up previous em-

30. *State ex rel. Kansas City v. State Highway Comm'n*, 349 Mo. 865, 163 S.W.2d 948 (1942) (en banc); *Duvall v. Duncan*, 341 Mo. 1129, 111 S.W.2d 89 (1937); *United States v. Westmoreland Manganese Corp.*, 134 F. Supp. 898 (E.D. Ark. 1955); *Bullock v. Sterling Drug, Inc.*, 93 F. Supp. 371 (E.D. Pa. 1950); *Southern California Enterprises, Inc. v. D. N. & E. Walter & Co.*, 78 Cal. App. 2d 750, 178 P.2d 785 (Dist. Ct. App. 1947); *Mankin v. Bryant*, 206 Ga. 120, 56 S.E.2d 447 (1949); *Phelps v. Blome*, 150 Neb. 547, 35 N.W.2d 93 (1948); *Howard Nat'l Bank and Trust Co. v. Newman*, 115 Vt. 61, 50 A.2d 896 (1947).

31. Williston says that the early basis for contracts was justified reliance upon a promise, and that it is consistent with this development to define sufficient consideration as either a benefit to the promisor, a detriment to the promisee suffered in reasonable reliance on the promise, or a combination of both. 1 WILLISTON, *op. cit. supra* note 10, § 140, at 618.

32. In many of these cases there is the additional element of uprooting and moving from one place to another. See, e.g., *Fibreboard Products, Inc. v. Townsend*, *supra* note 16; *Testard v. Penn-Jersey Auto Stores*, 154 F. Supp. 160 (E.D. Pa. 1956). This factor does not seem to affect the decisions materially, as there are cases with this element present holding both ways.

33. RESTATEMENT (SECOND), AGENCY § 442 (b) (1957).

34. As to a temporary job not likely, cited with approval in *Pryor v. Briggs Mfg. Co.*, 312 Mich. 476, 20 N.W.2d 279 (1945); *Lasser v. Grunbaum Furniture Co.*, 46 Wash.2d 408, 281 P.2d 832 (1955) (holding the position not important enough to apply the *Restatement's* presumption.)

35. *Testard v. Penn-Jersey Auto Stores*, *supra* note 32 (holding that moving was a sufficiently important change of position).

36. 45 F. Supp. 650 (W.D. Mo. 1942).

ployment to engage in the new job, valuable consideration exists.³⁷ Another court has held that giving up a civil service job under which the employee had acquired retirement rights was enough to satisfy the additional consideration requirement.³⁸

A California court of appeals has stated³⁹ that for sufficient consideration there need only be a detriment to the plaintiff, and that this requirement was met by a termination of prior employment and a return to the employment of defendant. Thus an oral contract, later reduced to writing, was found to be one for life employment.

In the Pennsylvania case of *Lucacher v. Kerson*,⁴⁰ the court found plaintiff had given sufficient consideration by terminating his past employment and moving from New York. This made an oral contract enforceable when plaintiff was discharged without cause two days after he had begun work.⁴¹

Through these cases and the *Restatement*, one may trace the development of a definite view that where the employee has, with knowledge on the part of the employer, given up previous employment, especially employment which entitled the employee to retirement or similar benefits, the contract is not terminable at the will of the employer.⁴² Under this view the Missouri court could have held the *Morsinkhoff* contract to be enforceable.

In declining enforcement of the contract, the Missouri court was following a line of cases stating that the surrender of previous employment is not independent consideration but merely a necessary incident to accepting new employment. The most outstanding of these cases are *Fisher v. Jackson*⁴³ and *Chesapeake & Potomac Tel. Co. v. Murray*.⁴⁴ The stronger of the two is *Chesapeake*, wherein plaintiff had been told that defendant would not discuss employment while the prospective applicant was working for another employer. The court said:

[T]he mere giving up of a job, business, or profession by one who decided to accept a contract for alleged life employment is but an incident neces-

37. *Alabama Mills v. Smith*, *supra* note 21.

38. *Eckhart v. Plastic Flim Corp.*, *supra* note 21. See also *Seymour v. Oelrichs*, 156 Cal. 782, 106 Pac. 88 (1909).

39. *Stone v. Burke*, *supra* note 21. See also *Millsap v. National Funding Co.*, 57 Cal. App.2d 772, 135 P.2d 407 (Dist. Ct. App. 1943).

40. 158 Pa. Super. 437, 54 A.2d 245, *aff'd*, 355 Pa. 79, 48 A.2d 857 (1946).

41. *Accord*, *Weber v. Perry*, 201 S.C. 8, 21 S.E.2d 193 (1942).

42. The facts of the main case can easily fit within this rule. The defendant knew that the plaintiff was working for another firm. The plaintiff told the defendant that in making the change he would be foregoing the benefit of the yearly bonus for working the complete year (the surrender of some other benefit under past employment).

43. 142 Conn. 734, 118 A.2d 316 (1955).

44. 198 Md. 526, 84 A.2d 870 (1951). See also *Ruinello v. Murray*, *supra* note 21; *Edwards v. Kentucky Util. Co.*, *supra* note 21; *Lynas v. Maxwell farms*, *supra* note 21; *Skagerberg v. Blandin Paper Co.*, *supra* note 21; *Malever v. Kay Jewelry Co.* *supra* note 21; *Savage v. Spur Distrib. Co.*, *supra* note 21; *Heideman v. Tall's Travel Shops*, 192 Wash. 513, 73 P.2d 1323 (1937).

sary on his part to place himself in a position to accept and perform the contract, and is not consideration for a contract of life employment.⁴⁵

This is what the Missouri court held.

III. PROMISSORY ESTOPPEL UNDER THE AMERICAN VIEW

There is another approach to the matter of employment contracts for an indefinite period which merits inspection. This is the use of the relatively new doctrine of promissory estoppel. If the courts will not accept the theory that the giving up of previous employment is sufficient to satisfy the second independent consideration requirement, may it be argued that the facts of the case raise a promissory estoppel in favor of plaintiff and that this may become a substitute for consideration, or even the necessary second consideration itself?⁴⁶

A. General Scope of the Doctrine

Williston says⁴⁷ that where a promisor has made a promise which has caused the promisee to incur substantial detriment on the faith of the promise, there are compelling reasons for enforcing the contract if injustice cannot be avoided by any other means, not only where the promisor intended the detriment but also where he should reasonably have expected the detriment would be incurred.⁴⁸ The United States Supreme Court, in *Dickerson v. Colgrove*,⁴⁹ has said that a person will not be allowed by language or conduct to lead another person into doing something which he would not otherwise do, and then subject such person to loss or injury by disappointing the expectation upon which he acted. These, and similar statements by other courts,⁵⁰ have led the American Law Institute in the *Restate-*

45. *Chesapeake & Potomac Tel. Co. v. Murray*, *supra* note 44, at 533, 84 A.2d at 873. The South Carolina Supreme Court, in *Orsini v. Trojan Steel Corp.*, 219 S.C. 272, 64 S.E.2d 878 (1951), has modified this general doctrine and applied it only in cases where the prior employment was of indefinite length.

46. The courts are in dispute over whether promissory estoppel is a kind of consideration or whether it should be considered as a substitute for consideration. Originally, the courts held that promissory estoppel was not sufficient consideration, but was a substitute which could be used in certain instances in lieu thereof. Thus promissory estoppel was given a place in the law similar to the *good* consideration of blood or love and affection, which can replace sufficient consideration in certain types of cases. Recently there has been a shift on the part of the courts and a blurring of the distinction between sufficient consideration and the substitutes therefor. Today several courts recognize promissory estoppel as a variety of sufficient consideration. *Porter v. Commissioner of Internal Revenue*, 60 F.2d 673 (2d Cir. 1932); *Miller v. Lawlor*, *supra* note 25. For a general discussion of this area see 47 IOWA L. REV. 725 (1962).

47. 1 WILLISTON, CONTRACTS § 140 (3d ed. 1960).

48. More in point with the principal case, Professor Boyer says: "Where the promisee has made a considerable outlay or has done serious acts which, unrewarded might jeopardize his financial or economic status, his position is one which merits judicial intervention." Boyer, *Promissory Estoppel Requirements and Limitations of Doctrine*, 98 U. PA. L. REV. 459, 479 (1950).

49. 100 U.S. 578 (1879).

50. *Curtiss Candy Co. v. Silberman*, 45 F.2d 451 (6th Cir. 1930); *Volkwein v. Volkwein*, 146 Pa. Super. 265, 22 A.2d 81 (1941).

ment of Contracts to include section 90,⁵¹ which is considered to be the basis of the modern doctrine of promissory estoppel.

Professor Boyer has pointed out that courts frequently hesitate to act when faced with a request to enforce the entire promise because they believe that complete enforcement would work an injustice on the promisor, and that they therefore deny any relief at all, often working an even greater hardship on the promisee.⁵² He maintains that promissory estoppel can be used to fill the gap between a mere promise and a completed bargain, operating rationally and logically to protect justified reliance and to avoid patent injustice to the promisee. Boyer continues by suggesting that in measuring the damages granted under this doctrine, courts use the well-established contracts rule of *Hadley v. Baxendale*.⁵³

The doctrine of promissory estoppel has become well established in several fields of law, most notably those of charitable subscriptions, parol promises to convey land, gratuitous bailments and agencies, rent reduction cases,⁵⁴ and retirement annuities.⁵⁵ The Oregon Supreme Court, in *Schafer v. Fraser*,⁵⁶ has said that there is nothing peculiar about these fields which would compel the conclusion that the doctrine of promissory estoppel is anomalous or requires narrow application and use with restraint. Throughout these fields runs a common thread—that of justified reliance by the plaintiff-promisee on a promise made by the defendant-promisor. The Oregon court believed that the doctrine is one which merits general application, allowing a promise to be enforced where the plaintiff is uncompensated for his reliance and where the facts of the individual case bring it within the rigorous requirements for applying the doctrine. Since Missouri has adopted the doctrine

51. The section reads: "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise." For cases following the *Restatement*, see *RESTATEMENT IN THE COURTS, CONTRACTS* § 90, at 350 (1954 Supp.).

52. The main case seems to be a prime example of this statement.

53. 9 Ex. 341 (1854). This doctrine allows the plaintiff to recover as damages for the breach of contract only those losses which, at the time the contract was made, were reasonably foreseeable by the party being charged with the breach.

Another method of determining damages is suggested in 47 IOWA L. REV. 725 (1962). This is the reasonable opportunity for recoupment doctrine. It is developed from an analogy to the dealer-franchise cases, e.g., *Allied Equip. Co. v. Weber Engineered Prods.*, 237 F.2d 879 (4th Cir. 1956); *Goodman v. Dicker*, 83 App. D.C. 353, 169 F.2d 684 (D.C. Cir. 1948); *Gibbs v. Bardahl Oil Co.*, 331 S.W.2d 614 (Mo. 1960). Under this doctrine, the plaintiff would be allowed to recoup any financial losses he had suffered in accepting the new employment, on the basis that the defendant knew or should have known that the losses would occur as a result of accepting the contract and has not allowed the contract to last a sufficient time for the plaintiff to recoup them.

54. See Boyer, *Promissory Estoppel: Principle From Precedents*, 50 MICH. L. REV. 639 (1952).

55. *Feinberg v. Pfeiffer*, 322 S.W.2d 163 (St. L. Ct. App. 1959); *West v. Hunt Foods, Inc.*, 101 Cal. App.2d 597, 225 P.2d 978 (Dist. Ct. App. 1951); *RESTATEMENT, CONTRACTS* § 90, illustration 2.

56. 206 Ore. 125, 290 P.2d 190 (1955).

of promissory estoppel,⁵⁷ could not the *Morsinkhoff* case have been decided on this basis, provided that all requirements of that doctrine were met? Certainly, it would seem, the basic philosophy underlying an application of the doctrine in cases involving charitable subscriptions, etc., is equally present in a case involving an employment contract of indefinite duration.

B. Requirements of the Doctrine

The authorities seem to agree that there are three requirements for the application of the doctrine.⁵⁸ First, there must be a promise upon which the plaintiff-promisee relied. Second, there must be a substantial change of position on the part of the promisee in reliance on the promise. Finally, injustice must be unavoidable except by enforcing the promise.

1. The Promise

There is some variance among the courts as to the necessary circumstances surrounding the defendant's promise. The most cogent view is expressed in the two articles by Professor Boyer⁵⁹ and by the *Schafer*⁶⁰ case. These authorities require an element of foreseeability on the part of the promisor. Boyer says that the promisor must reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee. The *Schafer* case uses the reasonable man test, *i.e.*: Would a reasonable man in the position of the defendant foresee that his promise would induce conduct on the part of the plaintiff of the kind that actually occurred? Therefore, for the doctrine to apply, the defendant must have some knowledge, or reasonably should realize, that his promise is going to cause substantial reliance of a definite character on the part of the plaintiff.

How does this fit the facts of *Morsinkhoff*? Here defendant reasonably should have known, and, indeed, as the evidence shows, actually did know that his offer of employment was going to cause substantial reliance of a definite character—plaintiff's termination of former employment to accept the new employment. Therefore, all the elements are met. The defendant knew his promise was going to cause

57. *Feinberg v. Pfeiffer*, *supra* note 55. This was the first case in Missouri to recognize promissory estoppel by that name. It involved a reliance by the plaintiff on a promise of the defendant to pay her an annuity of 200 dollars a month for the rest of her life. The plaintiff surrendered her employment with the defendant on the basis of this promise. This reliance was held to be sufficient detriment to support promissory estoppel, and in this respect is analogous to the problem in the *Morsinkhoff* case. Why did the court in *Morsinkhoff* not consider this case in making their decision? The *Feinberg* case gives a good survey of the Missouri development of the doctrine of promissory estoppel and identifies Missouri's position under *Restatement* section 90.

58. *Schick Service, Inc. v. Jones*, 173 F.2d 969 (9th Cir. 1949); *Miller v. Lawlor*, *supra* note 25; *Schafer v. Fraser*, *supra* note 68; Boyer, *Promissory Estoppel: Principle From Precedents*, 50 MICH. L. REV. 639 (1952); Boyer, *Promissory Estoppel: Requirements and Limitations of Doctrine*, 98 U. PA. L. REV. 459 (1950).

59. Boyer, *Promissory Estoppel: Principle From Precedents*, 50 MICH. L. REV. 639 (1952); Boyer, *Promissory Estoppel: Requirements and Limitations of Doctrine*, 98 U. PA. L. REV. 459 (1950).

60. *Supra* note 56.

substantial reliance. He knew the exact nature of this reliance. The plaintiff did in fact so rely. There seems to be no reason to exclude the case under this requirement.

2. Change of Position and Reliance

All the authorities are in agreement that there must be an actual and substantial change of position on the part of the plaintiff in reliance on the defendant's promise. This reliance must be of a substantial and definite nature. Again, the main case fits the requirements easily. No one should doubt that the giving up of a job, where one has established seniority rights and become eligible for a bonus on completion of each year's work, is a substantial change of position on the part of the plaintiff. The termination of any employment, where the employment is of a steady nature, in favor of a mere promise of employment is a substantial change of position with the economic well-being of the plaintiff definitely being affected.

The other part of this requirement is that the change be made in reliance on the promise of the defendant. From the agreement reached in the main case, there can be little doubt of the plaintiff's reason in quitting his present employment. While he was unhappy with his employment, he had, at the same time, acquired certain economic benefits under it, and was willing to give these up in order to improve himself by accepting the defendant's offer of employment.

3. Avoiding Injustice

As a final factor, the cases impose the requirement that injustice must not be avoidable in any other way. There must be no alternate remedy to enforcing the contract. The Missouri court, not adopting any of the possible solutions mentioned in this article, and finding no other remedy applicable, left the plaintiff to suffer an injury for which there was no remedy. Here also, then, *Morsinkhoff* fits the requirements for promissory estoppel.

In the case of *Weidman v. United Cigar Stores Co.*,⁶¹ where the plaintiff was fired soon after he had started to work, the court had this to say:

To impose on the contract a strictly legal construction of the terms used in the hiring clause would allow the employer, for no breach whatever on the part of the plaintiff, to deprive the latter of his employment within the first hour after he had entered upon his duties. Any such construction would have results which could not reasonably have been intended, and would be in plain disregard of the meaning and spirit of the agreement.⁶²

It is hard to believe that Morsinkhoff intended to leave his relatively secure job⁶³ in order to follow a will-o'-the-wisp chance that the defendant would honor his promise of employment. Both parties must have meant this agreement to have some definite legal effect. The court, unfortunately, appears to be applying narrow legalistic doctrines, and thereby disregarding the intent of the parties.

61. 223 Pa. 160, 72 Atl. 377 (1909). In this case, plaintiff had sold his store to the defendant and agreed to become the manager of the defendant's stores in another region.

62. *Id.* at 163, 72 Atl. at 378.

63. He had been employed for five years.

C. *Authorities Considering the Estoppel Question*

The authorities on this exact problem are few and approximately evenly split. Mechem⁶⁴ argues that where the employee has suffered a special detriment, such as giving up a good job or moving his family, in consideration of permanent employment, such detriment is usually of a substantial nature and is a known and discussed factor in the bargaining between the parties. This change of position should emphasize to both the employer and the court that more than a terminable employment is expected, and that the plaintiff is contracting for something more permanent. Thus Mechem feels that, since the change of position is made in reliance on the promise of the defendant, there should be an estoppel raised against him.⁶⁵

In *Alaska Airlines v. Stephenson*,⁶⁶ the court, relying on *Seymore v. Oelrichs*,⁶⁷ felt that the relatively new growth of tenure rights and fringe benefits and their modern importance in most jobs was sufficient to tip the scales from judicial non-enforcement of these contracts in the past to enforcement by the courts in the future. The court held that where the plaintiff had surrendered a job with these tenure rights and fringe benefits in order to accept new employment, a promissory estoppel should be raised in his favor. In a similar case, *Goodman v. Dicker*,⁶⁸ wherein the plaintiff opened a radio retailing business, hired salesmen, and incurred the expenses of establishing the business, relying upon the promise of the defendant to grant a franchise and deliver radios for resale, the court held that there was no contract on which the plaintiff could have specific performance, but that the plaintiff by way of estoppel could recover his costs of establishing the business.

Conversely, in a recent Utah case,⁶⁹ the plaintiff tried to claim under the doctrine of estoppel that his employment contract should last from 1958 until 1966,⁷⁰ in that he left his previous position, moved from Dallas, Texas, and accepted a lower salary and an inferior executive position. The court, in a rather obtuse opinion, held that this would be sufficient consideration to merit the inclusion of this provision in the original contract; but, since this was not done, it was not sufficient to raise an estoppel in favor of the plaintiff. Again, after speculating as to what the Iowa law would be on the subject, a federal court, in *Bixley v. Wilson & Co.*,⁷¹ held that the giving up of farm leases in order to accept positions as strikebreakers with the defendant, where the defendant promised the jobs would be permanent, but later fired plaintiffs as the result of union pressure, was insufficient

64. MECHEM OUTLINES AGENCY § 556 B (4th ed. 1952).

65. *Ibid.*

66. 217 F.2d 295 (9th Cir. 1954) (oral contract for two years employment).

67. *Supra* note 38.

68. *Supra* note 53.

69. *Bullock v. Deseret Dodge Truck Center, Inc.*, 11 Utah 2d 1, 354 P.2d 559 (1960).

70. This claim was based on his being granted stock options until this time.

71. 196 F. Supp. 889 (N.D. Iowa 1961). *But cf.* *Baltimore & O. Ry. Co. v. Foar*, 84 F.2d 67 (7th Cir. 1936), where returning to work during a strike was held sufficient consideration for an oral promise for permanent employment. See also the companion case, *Albers v. Wilson & Co.*, 184 F. Supp. 812 (D. Minn. 1960).

to raise an estoppel which would satisfy the second consideration for permanent employment.⁷²

CONCLUSION

From these cases, it can be seen that there is a relative dearth of authority on the precise point, and that the courts are only beginning to formulate adequate rules. As Mechem says,⁷³ the area of permanent or life employment has in the past been one where the rules are arbitrary and unsatisfactory, often rendering unjustified and unjust results. Part of this problem arises out of the lack of an adequate definition of permanent employment, and the hesitancy on the part of the courts to act, out of fear of doing injustice to the promisor, as well as a feeling of inability to measure damages. But this does not change the reality of the fact that the plaintiff believes that he has obtained some job security and will not be subject to dismissal without just cause. Certainly, in an age where there is a great demand for all types of security, especially economic security, this is a reasonable belief. The courts, if they are attuned to the reality of the situation, should not continue to turn a deaf ear to a promisee who has acted in reliance upon a promise of employment by surrendering previous employment, and thereby allow the promisor, knowing of this reliance, to frustrate the promisee's expectations. Certainly this is an area wherein the promisee should be able to act with the same justified reliance as in the case of charitable subscriptions. Some of the courts have so held, extending the doctrine of promissory estoppel to protect the promisee's reliance. Thus the original application has been made, but only the future can tell whether the extension will gain the acceptance that it was denied in *Morsinkhoff*.

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72. The commentator in 47 IOWA L. REV. 725 (1962) severely criticizes the court's decision in this case, both as to the justice of the outcome and as to the application of Iowa law. He concludes that at present the Iowa court would probably not require two considerations for this type of contract, but instead would apply the intent of the parties test regardless of the presence or absence of the second consideration.

73. *Op. cit. supra* note 64, § 552.