ENFORCING BENEVOLENT PROMISES

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1.

Gratuitous promises have caused much difficulty about their enforcement in virtually all legal systems, including the common law. Not that there is no possibility of making gifts. Even at common law, not only does a gift, once executed, become irrevocable; we can also make executory or future gifts by establishing donative trusts for specified beneficiaries, or by covenanting to establish a trust for children, perhaps still unborn. Under orthodox contract theory, however, a simple promise of a gift is not enforceable as such, on the well-known ground that, not being a bargain-promise, it clearly lacks consideration,—the promisee (as it is usually put) here suffers no detriment or loss, at least no loss comparable to the economic injury he suffers where a bargain is not kept.

Now it is true that a broken bargain-promise is both the most frequent and most typical instance of a breach of promise leading to material loss, precisely because the promise creates expectations in the promisee that so strikingly anticipate profits and gains. A gift-promise, on the other hand, excludes, by its very nature, expectations of market-opportunities. Gratuitous promises of course create expectations of financial benefits or advantages, but they are welcome windfalls as distinct from profits earned for a price. The fact remains that there do exist gift-promises which are also capable of causing significant expectations as well as significant loss,—loss resulting from the promisee's change of position, usually a change in his or her projects or plans in life. The law has indeed not been unaware of this, has in fact increasingly recognised gift-promises of a certain sort in recent years, though it has done so in an indirect and somewhat covert way, either by torturing such promises into regular contracts resting on bargain-theory, or by resorting to an *ab extra* doctrine, that of promissory or proprietary estoppel. Obviously neither device would have been needed had the law developed—as we shall argue it still can, at least if established results are given their full due—a wider promissory theory according to which legal liability arises not only in

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circumstances of a bargain but wherever a promisee suffers both a material and (no less important) a practically remediable loss.

What we now mean by practical remediability should be clearer once we distinguish between various kinds of gift-promises, for they are not all the same. Many, and among the most familiar, such promises are made by strangers, usually on a sudden impulse, without any discernible motive other than generosity. The proverbial rich man's promise to a passing beggar, bounteous though it is, is nonetheless far from apt to create more than a dubious expectation; in fact the more extravagant the promise, the weaker its reliability, for the less the sense it makes. What would be its motive, what sort of relationship would the promisor seek with the promisee? Faced with a generous promise, out of the blue, from a total stranger, for reasons unknown, the promisee would not know whether the stranger actually puts himself on the line as promisor, or whether he is not rather making a vague prediction that he might continue to feel generous enough to hand over the money when the time comes. So a promise from a stranger ('I will give you $1,000') can create 'expectations' of a kind, yet expectations rather in the nature of hopes, hopes of some windfall coming one's way; but still only hopes since the promisee has, as yet, no reason to believe in the promise made.[1] What is more, even if we did regard the stranger's promise to a beggar as a proper promise, or as morally a *prima facie* binding one, the moral obligation would still not be very strong. The promisee, it is true, deeply disappointed not to receive the gift, would have some complaint against the promisor ('but you promised'); however the latter might then advance an excuse, which in circumstances as the present would be plausible enough, that, when making his (perhaps hasty) promise, he overestimated his financial resources, or underestimated his existing liabilities, or that his whole situation suddenly changed for the worse. Not only does all this greatly weaken the moral obligation in favour of the promisee, the promisor has this further objection as well: that while the promisee may well be disappointed in not getting the gift, he cannot claim to have incurred a loss; the broken promise does not leave him worse off.

There are other kinds of gratuitous promises, however, of far greater moral or legal significance. Though they too are promises made with a generous intent, they are yet promises with another purpose, that of establishing a close personal or co-operative relationship between promisor and promisee. Hence, we should immediately distinguish (1) the pure gift-promise (such as that to a beggar as above) from (2) what we may call 'social' or 'friendly' promises, usually but not exclusively between friends, and from (3) what we shall call 'benevolent' promises which contemplate, often encourage, certain actions or courses of action as

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[1] For some discussion of how or why promises create expectations or obligations, see "Promise, Expectation and Agreement" (1988) 47 *Cambridge L.J.* 193; and "Keeping Promises: The moral and legal obligation" (1988) 8 Legal Studies 258.

between husband and wife or between members of a family.[2] Clearly promises (2) have to be taken very seriously. Where A promises B to dine with him, or to play chess together, this is not, morally, a promise written in sand. Because where B says to A 'promise you'll be there' (for dinner or chess), B invites a prediction not just that A might be there, but that he will. Being a free agent, A may still break his word; but if he does, B will have a justifiable criticism of A which the latter can answer only with a just excuse or at least an apology. For A cannot leave his friend simply waiting without warning that the appointment will not be kept. Thus, A comes under an obligation, a moral obligation, to explain himself, if only because B, his expectations as well as his dignity perhaps hurt by A unilaterally breaking his word, may now insist on an answer when asking A: 'why? why didn't you come?'

Still, even if A, as promisor, has this moral obligation, this does not automatically make his promise legally binding as well, however much it may be true that a promisor cannot be legally liable unless he is under a moral obligation in the first place. As regards legal liability, to put this in another way, moral obligation is, in this as in so many other situations of attributing responsibility, a necessary condition, but is not a sufficient one. The sufficient condition, it is important to see, depends upon the remediability of the broken promise; there must be a remedy a court can practically impose so as to make good the breach together with the resulting harm to the promisee. Precisely this remedial possibility is absent in the 'social' or 'friendly' promises we are now considering. Suppose, to take a simple example, a court of law were minded to enforce A's promise to dine with B: how is this to be dealt with remedially? How can a court impose a remedy by way of damages? How can it quantify the hurt by A to B? And if it rejected a monetary remedy, can it devise redress by specific performance, as by compelling A to attend another dinner or chess-party with B? How long after the event would this constraint obtain? How far is the constraint to be pressed if one side or the other refuses to attend? Social and friendly promises, it quickly transpires, though clearly inviting moral blame if not kept, do not lend themselves to practical legal remedies.

Though related, the position is nevertheless significantly different in relation to gratuitous promises falling into group (3), those we just distinguished as 'benevolent', that is, promises arising under some friendly or family arrangement, offering financial assistance or support to a promisee: promises from father to son, or uncle to nephew, or husband to wife. In a famous case a famous judge, however, lumped promises (2) and (3) together, entirely failing to notice the crucial difference between them.[3] Granted that mutual promises to take a walk together, or to offer

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[2] We later distinguish two other gratuitous promises: one given for past but beneficial services; the other, a promise clothed in formalities as a special writing. These, as we shall see, raise different problems not relevant immediately.

[3] Atkin L.J. (as he then was) in *Balfour* v. *Balfour* [1919] 2 K.B. 571, 578.

each other hospitality, are 'ordinary examples' of agreements ineffective in law, it by no means follows that agreements between husband and wife belong to the same non-legal or non-enforceable category.[4] The great feature of benevolent promises is that they are not only expectation-creative but manifestly remediable, since a breach now results in a quantifiable loss. Take an ordinary domestic promise by which a husband (H) promises his wife (W) a regular weekly allowance to take care of the family. Is this promise to be legally (or unilaterally) withdrawable by H? Certainly H's promise is gratuitous, there being no special bargain for the promise to W. No doubt, too, that H's promise of maintenance or support, even if enforceable, cannot remain so indefinitely, without revision or recall. H's economic position may change radically, leaving him unable to afford the full amount promised by him. Conversely, the wife may have difficulty in obtaining all the necessities for the family on the amount promised to her. What, therefore, such promises require is that they only continue for a reasonable time and that, in any case, they be modifiable as circumstances demand, simply because they must somehow keep in touch, on the one hand, with H's ability to pay and, on the other, with W's actual, perhaps increasing, needs.

We shall have to say more about this feature of modifiability attaching particularly to benevolent promises later on. Subject to this, however, it can at once be seen that there is really no other objection to holding the husband's promise to be an enforceable one. For we now have to do with a remediable promise—not only because he can now be made to pay a specified amount, but also because its non-payment would cause serious harm to his wife and family. Nor is there any convincing reason why such promises should be kept out of court. The argument that such promises, if made justiciable, might overrun the courts applies to all loss-creative promises, not to domestic promises alone.[5] Among candidates for legal enforcement, neglected wives and children can surely have no lesser social priority than commercial promisees. But, at all events, courts have been singularly unable to disregard benevolent or domestic promises. We are about to see how they have dealt with them.

2.

A considerable number of legal decisions uphold what are nothing but benevolent promises within familial relationships. One such group we first consider presents itself as purely contractual, as though the promises in question were wholly in keeping with classical contract principles. The reason is not far to seek. It is relatively easy to construct a contract out of a gift-promise, provided the latter is made conditional

[4] *Ibid.*

[5] *Ibid.*

upon certain events, that is, conditional upon the promisee doing various things, things often even for his own benefit, such as starting a marriage or a career, the promisor's gift being intended to assist the promisee in realising an important project in life. A benevolent promise, precisely because it is typically conditional upon the promisee 'acting' on it, thus also becomes easily construable as furnishing 'consideration' by the promisee, thereby allowing the agreement to parade as a bargain, or at least some sort of quasi-bargain, when what is involved is in truth simply a gift.

Three instances should suffice. In a well-known case, an uncle promised his nephew financial help, as the latter was starting upon a legal career and was about to be married as well; the promise was held legally enforceable, the court finding consideration in the nephew's detriment in altering his position, since he both got married and became a barrister.[6] Obviously this promise was nothing more than the promise of a gift, conditional upon certain events rather within the donee's power to bring about, still events which were no *quid pro quo* for the promise, only conditions without whose fulfilment the promise was not operative. In another case, a promise to a widow was upheld to allow her to remain in the matrimonial home during her widowhood. The house had belonged to her husband who before his death had asked his brother to see to it that the wife should have the house; the brother thereupon promised that 'in consideration of the deceased's wish of seeing his wife better provided for', he would convey the house to the wife, provided she paid the sum of £1 p.a. in rent as well as keep the premises in tenantable repair. The brother then objected that the agreement was nothing more than a gift with certain obligations attached to it. But the court would not let him revoke, without actually denying that the arrangement was gratuitous; in agreeing to pay some rent, though small, and to do necessary repairs, the widow, it was said, furnished 'real' consideration for the brother's promise, whether the consideration was adequate or not.[7] Unsatisfactory as this explanation is, the proposition for which the case has now become authority is that a promisee's consideration, while having to be 'real' or 'sufficient', need not be commercially 'adequate'. More recently, again, where a married man, in a liaison with another woman became the father of twins, for whom he bought a house, with money he borrowed, although making it clear that he would not marry her, the court implied a promise whereby the man granted the woman a licence to stay in the house for herself and her children so long as they were of school age and the accommodation was reasonably required by them.[8] The court said that the woman had given good consideration for that licence by giving up her rent-controlled flat and looking after the man's

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[6] *Shadwell* v. *Shadwell* (1860) 9 C.B.N.S. 159.

[7] *Thomas* v. *Thomas* (1842) 2 Q.B. 851.

[8] *Tanner* v. *Tanner* [1975] 3 All E.R. 776.

children at the house. But giving up her flat was hardly consideration in any orthodox sense; it was just her way of joining her lover and children in a new (and apparently more comfortable) home. To speak of 'implying a contract'—or what Lord Denning called 'imposing the equivalent of a contract'—was then but another way of saying that such a promise, though essentially benevolent or gratuitous as distinct from one connected with a bargain, would nevertheless be upheld.[9]

This is not all. Given the ease with which 'domestic' promises of benevolent assistance can be transformed into contracts satisfying the bargain-principle, the law began to look for another requirement if the distinction between contracts and gifts was somehow still to be maintained. The distinguishing idea was found in what came to be called the *animus contrahendi*, or intention to be contractually bound, according to which a promise, even if it did meet the 'consideration'-test, was yet not enforceable if both sides failed to display an appropriate intention to contract. Now, admittedly, there can be no contract unless both sides do intend to be bound. But that they so intend normally follows from their exchanging an 'offer' and 'acceptance', precisely because these rules of formation are all predicated on an intention to contract. The corollary is that, normally at any rate, the parties exchanging an offer and acceptance must state expressly that they do not intend to be so bound, or only partly, for otherwise it can only be presumed that they do.[10]

However it is quite another matter to infer such a negative intention, i.e. an intention not to contract, where the parties make an agreement without indicating any intention not to be bound. Yet in a famous case already adverted to precisely this inference was drawn. In *Balfour* v. *Balfour*,[11] very briefly, a husband promised his wife a monthly allowance while they lived apart, she remaining in London for medical reasons, he returning to Ceylon, an arrangement first intended as a temporary separation but then agreed by both to be permanent. The Court of Appeal declined to see this agreement as a legally valid one. Here it was not easy to deny the 'consideration' on either side, if only because one party (the husband) obtained a benefit while the other (the wife) incurred a detriment (sacrifice of her conjugal rights); nonetheless the court insisted that such agreements to live apart are not contracts intended to be legally enforced. It is clear the court, though misled by the analogy with gratuitous promises generally, nevertheless did perceive that such (husband-wife) agreements are essentially gift-like in character even if 'consideration' can be technically shown. What the court did not see was that this was not just an inconsequential gift-promise by the husband, but a gift-like arrangement of a special, because of (what we called) a benevolent, kind.

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[9] *Id.* at 780.

[10] *Rose & Frank* v. *Crompton & Bros Ltd* [1925] A.C. 445.

[11] [1919] 2 K.B. 571.

As her husband, the promisor was anyhow liable to maintain the wife, even without a special promise of maintenance; his promise therefore merely quantified what monthly assistance she could expect to enable her to arrange for her upkeep while sick. Moreover, far from there being no intention to make an agreement with legal effect, an enforceable promise of support was essential to the wife if she was not to be stranded without (we may presume) any other support; to this extent she had even 'acted' on her husband's promise to her own disadvantage or detriment. The court did mention another difficulty of greater substance, but again one quite resolvable. If we hold this to be a contract, said Warrington L.J., the arrangement would be permanent, with the wife kept to her monthly allowance (£30), whatever other changes occurred.[12] This was not necessarily so. For one thing, the agreement could have been construed as valid only for a reasonable time. For another, as earlier pointed out, this is precisely the sort of agreement which, especially if meant as an arrangement of longer duration, must be subject to periodic renegotiation or modification, having regard to the parties' respective positions which cannot be assumed to remain fixed being obviously always liable to change.

Though the *Balfour* v. *Balfour* principle of contractual intention remains accepted law, there are increasing signs that the decision itself will no longer be followed, even where the facts appear only too similar at first sight. So where a husband, on leaving the matrimonial home to live with another woman, promised to convey the home to the wife 'in consideration' of her making the mortgage payments still due, the promise was upheld.[13] The court had no doubt that the parties did intend to create legal relations; the wife wanted more than 'honourable understandings', as she wanted everything clearly specified. As the wife had also agreed to do something on her side, she could also be said to have given 'consideration', though this was no bargain, rather an amicable arrangement separating couples sometimes make. Still she was held entitled to a declaration that the house was hers together with an order that the husband join in transferring it to her. Again, where a mother promised her daughter she could reside rent-free in the mother's house, while the daughter pursued an academic course, the court agreed that such a promise of support might well be enforceable, for a reasonable period; in the circumstances the particular promise was considered not to have been intended to continue indefinitely: that it lapsed when the original purpose of the promise no longer obtained.[14] None of this, to be sure, is in the least to deny that the parties', particularly the promisor's, 'intention' is important, for only this enables us to interpret either the purpose or terms of the promised gift, or even whether a true benevolent promise was intended at all. Thus promises to a wife or child are sometimes

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[12] *Id.* at 575.

[13] *Merritt* v. *Merritt* [1970] 2 All E.R. 760.

[14] *Jones* v. *Padavatton* [1969] 2 All E.R. 616.

little more than promises of indulgent generosity, rather more like promises from or to a stranger we earlier discussed. Where, for example, a wife alleged her husband had agreed, before their marriage, to make her a dress allowance of $100 a year, her claim (after their separation) for the arrears of that allowance did not succeed.[15] The parties, said Dixon J., had done no more than to discuss and concur in a proposal for a regular amount to the wife she herself considered appropriate to their circumstances at the time of the marriage.[16] The husband, in other words, had made no real promise to the wife, or if it was a promise it was one of temporary bounty rather than of supportive benevolence.

3.

A parallel theme touching upon benevolent promises can be traced through situations having to do with promised marriage portions, situations often taking the form of informal marriage-settlements. Take the case of a father promising his would-be son-in-law to pay him and his daughter an annuity as from their wedding-day. American law has found proper consideration even here; by getting married the couple is said to incur a detriment, notwithstanding the fact they are merely complying with an existing obligation where they are already engaged.[17] As before, resorting to consideration rather conceals the true character of the present promise, this being again rather a benevolent promise of a conditional gift. English law took a different line, that of holding a father's promise to his future son-in-law to be a 'representation', thereby side-stepping the doctrine of consideration under which, at any rate in its classical bargain version, the father's promise was little more than gratuitous. More particularly, the law now recognised what was described as a 'wider principle' under which a man making a representation to another, in consequence of which the other changes his position, the representation cannot be withdrawn, but has 'to be made good'.[18] Not that the judges were under any illusion that the so-called representations were anything but promises; the so-called representations were in fact said to be 'engagements' made on a solemn occasion which, instead of just 'vague beliefs' did create firm expectations that financial assistance would be both forthcoming and relied upon.[19] The curious outcome was that, under

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[15] *Cohen* v. *Cohen* (1929) 42 C.L.R. 91.

[16] *Id.* at 96.

[17] *De Cicco* v. *Schweizer*, 221 N.Y. 431, 117 N.E. 107 (1917).

[18] For the notion of 'making the representation good', see *Hammersley* v. *De Biel* (1845) 2 C. & F. 45, 3 Beav. 469; *Pulsford* v. *Richards* (1853) 17 Beav. 87; *Bold* v. *Hutchinson* (1855) 20 Beav. 250; *Coverdale* v. *Eastwood* (1872) L.R. 15 Eq. 121, 131-2.

[19] As to what a representation must be, see *Laver* v. *Fielder* (1862) 32 Beav. 1, 12; *Moorhouse* v. *Colvin* (1851) 15 Beav. 341, 350; *Maunsell* v. *Hedges* (1854) 4 H.L.C. 1039. And see Pollock's instructive note on this: *Principles of Contract* (10th ed. 1936) 696. Promises to charitable foundations created similar problems in American law: some courts regarding them as supported by consideration, others using estoppel. See e.g. *Allegheny College* v. *National Chautauqua County Bank*, 246 N.Y. 369, 159 N.E. 173 (1927); and for estoppel, Restatement, Contracts 2d, s. 90(2) and Comments thereto.

an *alias* of representation, what was in effect a gratuitous or (more exactly) a benevolent promise was not only enforced, but specifically enforced.

This approach, admittedly, was technically 'outside', or at best on the margins of, orthodox contract law, being an approach separately initiated by equity, as a sort of *ad hoc* addendum, but otherwise independent of the main body of contractual principles which were, contemporaneously, built up and refined at common law. Even so, it should be obvious that the equitable doctrine, separate or marginal though it was, was nevertheless one of enormous potentiality capable of fundamentally undermining the whole contractual edifice based on bargain-theory. Not surprisingly, something of a counter-movement set in. In 1854 the House of Lords held that representations can refer only to existing intentions, thus excluding statements, let alone undertakings *de futuro*,[20] without so much as mentioning the notion of making-a-representation-good, a notion it had itself approved not quite a decade earlier.[21] In *Maddison* v. *Alderson*,[22] furthermore, Lord Selborne L.C. purported to deliver the *coup de grace* to that earlier doctrine, though its demise was never complete. The last-mentioned decision certainly succeeded in invalidating promises of a certain sort (in particular, informal promises of testamentary gifts of land for services in the home, promises now held invalid on the ground the services did not constitute sufficient part performance to exclude the Statute of Frauds). But this apart, the line adumbrated by the earlier notion of making-representations-good was to re-emerge, albeit in different form, sometimes as a sort of contract, sometimes by way of equitable estoppel, sometimes (and this, as we shall shortly see, by far the most interesting development) as a sort of mixture or hybrid of contract and estoppel combined. Which, indeed, far from really surprising, only added further proof that benevolent promises could not be discarded or disregarded by the courts.

Consider first certain benevolent promises which did not cause particular difficulty, that is promises inviting some 'reciprocal' action by the promisee, hence promises which, too, became easily construable as forming something akin to bargain relationships. In *Synge* v. *Synge*,[23] A made an ante-nuptial promise to B by letter whereby A was to leave B his house by will if she (B) were to marry him. B accepted and married A, although A later conveyed the house to another purchaser. A was held liable in anticipatory breach of contract, the measure of damages now calculated as the value of the possible life-estate to B. The Court of Appeal did not doubt this was a promise to be enforced. Kay L.J. in fact regarded *Hammersley* v. *De Biel*[24] as still 'of the highest authority';

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[20] *Jorden* v. *Money* (1854) 5 H.L.C. 185.

[21] *Hammersley* v. *De Biel*, supra; and see *Loffus* v. *Maw* (1862) 3 Giff, 592, 604.

[22] (1883) 8 App. Cas. 467, 473.

[23] [1894] 1 Q.B. 466.

[24] *Supra.*

accordingly a definite promise in a writing satisfying the Statute of Frauds to leave property by will, made to induce a marriage, and accepted by the promisee, would be enforced in equity.[25] Similarly in *Parker* v. *Clark*,[26] where the Clarks, an elderly couple, living in a large house, invited (by letter) the Parkers, a younger couple, partly related to the former, to come and live with them, broadly sharing running expenses, it being also stated that the Clarks would, after their deaths, leave their house to the Parkers, in recognition of the fact that the latter were to sell their own cottage upon changing abode. The Parkers having accepted and moved in, the arrangement broke down about a year later, the former being then told to find somewhere else to live. Devlin J. found the parties to have entered an agreement intended to be binding in law; that, moreover, the letter provided a sufficient memorandum in writing to satisfy the Statute of Frauds, and that, consequently, the Parkers were entitled to damages for a breach of contract, both for the loss of the benefit of living in the Clarks' house and for the loss of their promised inheritance.

The legal problems turn out to be considerably more difficult where the benevolent promises are not quite so 'reciprocal' as in *Synge* or *Parker*, so that the true gift character of the arrangement also becomes both more visible and pronounced. Suppose A, a father, promises B, his son, a piece of land as a gift, letting B into possession for B to build a residence thereon which B does at considerable cost; or suppose A promises the *de facto* wife he is leaving that the house she occupied would belong to her, while allowing her to spend a good deal of her own money on improvements.[27] In both cases A's promise to B is enforced, the promisor being estopped from reneging on it. In the first, B has a right to call on his father, or his successors in title, to complete the incomplete gift by the conveyance of the freehold to him. In the second, the *de facto* wife is similarly entitled to have the freehold conveyed to her, having so greatly changed her position in expectation of the husband's promise being performed. The law, it is said, will not complete an incomplete gift, so will not enforce a promise of a gift by itself; but it will stop the promisor from going back on his promise, especially if the promisee is already let into possession, so changing his or her position accordingly. There is such relevant change of position where he or she incurs expenditures,[28] or performs various domestic services such as helping with jobs around the house (like preparing meals for the promisor, or gardening for him),[29] or even where the promisee, in reliance on assurances by

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[25] [1894] 1 Q.B. at 469-70.

[26] [1960] 1 All E.R. 93.

[27] See, respectively, *Dillwyn* v. *Llewellyn* (1862) 4 De G.F. & J. 517; *Pascoe* v. *Turner* [1979] 2 All E.R. 945. These and similar cases have been described as 'proprietary' as distinct from 'promissory' estoppels as they have more to do with rights to land or possession of land. But in the present examples the rights to land arise from promises of a gift which promise may comprise all sorts of other benefits. *Dillwyn's Case* is further discussed below.

[28] See *Inwards* v. *Baker* [1965] 2 Q.B. 29; *Vinden* v. *Vinden* [1982] 1 N.S.W.L.R. 618; *Wood* v. *Browne* [1984] 2 Qd.R. 593.

[29] *Re Basham* [1986] 1 W.L.R. 1498; *Vinden* v. *Vinden*, supra.

the promisor, merely stays on in the house, possibly beyond a time where the promisee can make alternative arrangements as to where to live.[30] It is sufficient, said the Court of Appeal, if the promisee acts on the face of these assurances, in such circumstances that it would be unjust and inequitable for the party making the assurances to go back on it.[31]

It will be noticed that the above situations, or situations like it, be they doctrinally classified as instances of estoppel, or of licences, or (as in earlier days) as representations-to-be-made-good, all represent what are straightforward agreements or consensual relationships between the two sides; there cannot even be such consensual relationships unless there is an 'offer' or 'promise' by one side, a promise which can be both 'accepted' and 'acted' upon by the promisee. The point then is again that what we are enforcing are not so much estoppels or licences or representations as, rather, quite ordinary agreements, even though agreements or promises not at all of the usual kind, but essentially gift-like or benevolent in character, at any rate agreements utterly distinct from bargaining in which we exchange goods or services for a price. In many such situations, furthermore, legal enforcement sufficiently operates by preventing the promisor from reneging on his promise, so operating in effect, so to speak negatively, like a 'shield' rather than, positively, like a 'sword'. And while this is certainly good enough to protect a person against eviction from land, or in upholding his licence to stay on (making the latter irrevocable where it was only revocable before), an estoppel, as the doctrine stands, or at least classically stood until recently, is not enough to secure an affirmative remedy from the promisor, whether a remedy in damages for breaking his promise or a remedy compelling him to transfer the promised land. Indeed even a given contract is sometimes not capable of allowing such a remedy either because it is not in writing when it should be or its 'consideration' is in serious doubt, precisely because it is not sufficiently bargain-like.

It is to bridge this gap that the law evolved a curious hybrid combining elements of estoppel with elements of contract, in that contract provides a basis for the affirmative remedy, while estoppel, so to speak, ekes out the contract's deficiencies. Precisely this seems the true significance of *Dillwyn* v. *Llewellyn*,[32] where (on the facts already given) Lord Westbury L.C. pointed out that whereas a mere gift-promisee has no rights, his subsequent expenditure will supply a valuable consideration originally wanting, thereby making a promise of land specifically enforceable as well.[33] Lord Westbury's explanation, though serving his immediate purposes, left much to be desired from a theoretical point of view. How could the son's expenditure transform a gift into a bargain, when in doing

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[30] *Greasley* v. *Cook* [1980] 1 W.L.R. 1306.

[31] *Id.* at 1311.

[32] (1862) De G.E.F. & J. 517.

[33] *Id.* at 522. For a similar earlier result, see *United Joint Stock* v. *King* (1858) 25 Beav. 72.

what he did the son was merely complying with the condition of the gift. For this reason alone, it seems better to treat *Dillwyn* not as an 'exception' to consideration, or as *ex post facto* consideration (whatever that may mean), but more simply as a relatively early instance of (what we now call) proprietary estoppel or an equity to perfect a gift.[34] Yet the connection of this estoppel with contract must still not be overlooked. For what so importantly distinguishes it from promissory estoppel is precisely its 'positive' feature, that it can operate like a sword, a feature it owes almost entirely to its connection with contract that *Dillwyn's Case* pioneered. Unfortunately, this hybrid form of proprietary estoppel still does not seem to be completely understood. A trilogy of Australian cases admirably illustrates how this hybrid works in relation to benevolent promises.

In *Raffaele* v. *Raffaele*[35] the defendants, who wished their son to live near them, orally promised him that if he would build a house he was about to build on one of their blocks, they would transfer the block to him. Thereupon the son instead of building on his own, built on the land his parents promised to him. The court, clearly greatly influenced by *Dillwyn* v. *Llewellyn*, saw a combined contract and estoppel relationship between the parents and the son. There was a contract, it was said, because the parties intended to create legal relations, as well as because the parents' promise of the block was supported by consideration, since the son incurred a detriment in abandoning his own block while the parents received a benefit in having their son living near them. And while there was not even a memorandum in writing for the promise to convey the land, the son's building the house was a sufficient act of part performance so as to make the oral contract enforceable. But since the whole arrangement still looked more what in truth it was, that is, like a 'parent-gift promise' rather than a regular bargain, the court looked for an additional element which it found in estoppel, an estoppel created by the parents' conduct and the resulting expenditure by the son. It was this estoppel, moreover, that gave the son an equity to compel the parents to complete the promised transfer of the land.[36] In the particular circumstances, an order for specific performance being thought unsuitable (the son having died, the action brought by his widow as administratrix), damages were awarded on the basis of the value of the house. The present decision, one will observe went well beyond *Dillwyn's Case*; in the latter there was at least a written memorandum, while *Raffaele* had to overcome this deficiency as well as that of the lack of consideration there being here nothing more than an oral promise of a gift.

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[34] See D. E. Allan, "An Equity to Perfect a Gift" (1963) 79 *L.Q.R.* 238. Whether the promise is for the whole estate or merely for long licence or life-estate must in each case depend on the terms of the promise itself: see the matter discussed in S. Moriarty, "Licences and Land Law" (1984) 100 *L.Q.R.* 376.

[35] [1962] W.A.R. 29.

[36] *Id.* at 32-3, per D'Arcy J.

In our second case, *Riches* v. *Hogben*,[37] mother and son had orally agreed that if the son and his family were to migrate with her to Australia, she would buy a house in his name in which they all would live. The mother eventually bought a house, yet in her own name; and though the son moved in as originally planned, this was not for long: a quarrel arose and the mother evicted them. The Queensland Full Court held this to be an agreement intended to create legal relations, not just a loose family arrangement. Furthermore, if the contract was not as such enforceable, not being in writing, an interest in land could nevertheless be created by way of an equitable (or proprietary) estoppel where a party had acted to his detriment, as the son had here, incurring considerable expense in emigrating in expectation of a promise that he would be given a house in which to live. The court, accordingly, granted a declaration that the mother held the land on trust, together with an order for her to transfer the land to him, subject only to her own equitable interest to reside in the 'granny flat' attached to the house.[38]

Our last case, *Beaton* v. *McDivitt*,[39] is perhaps the most difficult of the three. The essential facts are that, in 1977, Beaton was introduced to McDivitt who, in a convivial conversation, told the former he owned a 25 acre lot which he wished to divide into four blocks as the local council was shortly (within two years it was thought) to rezone the land. Three of the blocks McDivitt said he intended to keep for himself and his two sons, but for the fourth he wished to find someone willing to occupy and cultivate it by a method of horticulture known as organic farming, the person so selected also to be given full title to the block when the land was rezoned. Beaton who took this as a proposal, as it was indeed meant to be, soon after accepted it as he was also having trouble with his own landlord. At another meeting Beaton offered to pay the rates for the block, but McDivitt said he preferred it if Beaton were to help maintain a new access road on the owner's other property. Early in 1978 Beaton moved in with his family, living at first in a tent, but gradually erected a bungalow constructed out of rock, McDivitt giving them some help in this. The Beatons set about cultivating the land, spending about $1,000 in planting between 50 and 100 trees to create something of a new ecosystem; but the new horticultural enterprise turned out a rather unsuccessful one. Relations between the Beatons and McDivitts appeared harmonious enough until 1982 when McDivitt objected to Beaton holding certain religious meetings on the property, McDivitt insisting he had a right to be consulted about strangers coming onto land that was still his, though Beaton disputed this. However in 1984 personal relations

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[37] [1986] 1 Qd.R. 315.

[38] See further to broadly similar effect: *Wakeling* v. *Ripley* [1951] 51 S.R. N.S.W. 183; *Thomas* v. *Thomas* [1956] N.Z.L.R. 785; *Todd* v. *Nichol* [1957] S.A.S.R. 72; *Jackson* v. *Crosby* (No. 2) [1979] 21 S.A.S.R. 280.

[39] (1988) 13 N.S.W.L.R. 134 (Young J.); (1988) 13 N.S.W.L.R. 162 (C.A.).

between the two sides deteriorated crucially; officers of the local council then also condemned Beaton's rock house, erected as it was without council approval, as not meeting minimum building requirements. Early in 1985 McDivitt asked the Beatons to leave the land altogether, to which Beaton objected, claiming instead that the land be conveyed to him.

Though, at trial, Young J. rejected the present applicability of equitable or proprietary estoppel, he nevertheless found there was a binding contract between the parties; for even if the arrangement began as a conditional gift-promise, it was detrimentally relied upon by Beaton as promisee, a reliance that furnished *ex post fact* consideration for the promise, this again under the doctrine of *Dillwyn's Case.* The same judge eventually held this contract not to be enforceable because it became 'frustrated', a matter to which we shortly return. For the moment it has to be added that, in the Court of Appeal, a majority supported a contractual approach, though not on *Dillwyn* lines. Mahoney J.A. thought there was here a so-called unilateral contract, since McDivitt made not just a statement of intention to make a gift, but a promise for an act, a promise intended to be legally binding, the promise being that McDivitt would transfer title to the land if Beaton were to come and work on it in the specified way. McHugh J.A., while disagreeing there was a contract with consideration (for the simple reason that Beaton had paid no 'price' or given any '*quid pro quo*' for the defendant's promise), nonetheless concluded, virtually concurring in this with his brother Mahoney, that a unilateral contract had come about, one very much like that in the well-known *Carbolic Smoke Ball Case*,[40] inasmuch as the promisor had, by his promise intended to be legally binding, made a request for an act by the promisee which the latter had complied with, by coming and working on his land, more or less in the manner as the latter had been invited to do.

It is quickly obvious that none of these purely contractual explanations survives deeper scrutiny. Not, as already said, the explanation by way of *ex post facto* consideration, for this could not, and did not, make a bargain out of a gift; the so-called subsequent 'detriment' or 'consideration' merely indicated that the condition in the (conditional) gift seemed to have been performed. Neither was the second explanation of a unilateral contract more satisfactory. For even if there was a promise for an act, the whole arrangement was still one of gift, not one of a contractual exchange. Whatever be, in any case, the correct view of *Carbolic Smoke Ball*, the least that can be said is that it was not a gift-relationship. On this point, Kirby P. was surely correct to insist that, however indulgently one approached the present facts, with every sympathy for Beaton, it is not possible to see the arrangement as being a bargain rather than a gift.

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[40] *Carlill* v. *Carbolic Smoke Ball Company* [1893] 1 Q.B. 256.

Still, even to deny the existence of anything like an orthodox contract between the parties, does not have to drive us to equitable estoppel as though this alone offers, in circumstances such as the present, a sufficient 'jurisprudential basis' for relief. For it is not really enough to say that equity will intervene to protect the promisee against 'unconscionable' conduct, or to ensure that 'injustice' is not done to him, where a promisee is induced to incur expenditure in an 'expectation' that certain land will be his.[41] It is not enough, in the first place, because the 'unconscionable' discretion is left too wide, as we are still not told what sort of 'expectation' is here to be protected, or why a legal owner cannot 'exercise his legal rights'. Secondly, and more technically, estoppel, by itself, can of course give a promisee the needed protection where all he seeks is protection for a time, including a licence for life. However, as already explained, estoppel alone cannot, or at least classically could not, give full relief where what the promisee is promised not just a licence to stay on the land for a time but full title to it. It is true that an appeal to estoppel allows judges, as it allowed Kirby P. in this case, to hold a gratuitous promise as eminently revocable, revocable if no injustice is thereby done to the promisee, instead of approaching the situation (as the majority approached it) through contract, thus by-passing any further determination whether that contract is 'frustrated' or not. The trouble is that estoppel, discretionary as it now is from case to case, fails to give systematic reasons as to what classes of gratuitous promises now may, or may not, be enforced.

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Interesting, even pathbreaking, as some of the preceeding results evidently are, they yet conceal as much as they achieve. In particular, they conceal what is theoretically or systematically at stake in relation to benevolent promises. For an approach *via* ordinary contract or estoppel rather deflects attention from what is important now, namely, the specific reasons we can give as to why benevolent promises are, or are not enforced, however much they do not fit, often indeed are at odds with, orthodox contract theory. In fact the question may be asked whether torturing gifts into bargains, or resorting to a separate doctrine like estoppel with all its own independent rules, has not hindered rather than helped the reform of contract from within: whether, left to itself, contract theory might not have evolved a wider and more comprehensive view of promissory liability. However this be, the major reason for enforcing benevolent promises should no longer be unclear. As we have said repeatedly, that reason simply is that benevolent promises create reliable expectations just as they may cause significant material loss, including at the very least a detrimental change of position by the promisee. Often they are promises to support or assist children or young persons in their immediate life-

[41] The Court of Appeal here much relied on *Ward* v. *Kirkland* [1967] 1 Ch. 194, 235, adopted in *Olsson* v. *Dyson* (1969) 120 C.L.R. 365, 379, per Kitto J.

plans like starting a course of study, or a career, or marriage; often they are now promises by which deserting husbands or *de facto* spouses assure their wives or families some maintenance or accommodation for the time being at any rate.

Not, to be sure, that such promises are enforceable only because they come from parents or spouses or persons in strictly domestic relationships, for benevolent promises can be made as between friends, or even persons who by their mutual arrangement are supposed to become relatively close. What, in sum, therefore makes for the enforceability of these promises is that they are apt to create, as promises from mere stranger are not, not just unrealistic hopes but reliable expectations, if only because the promisee will now be aware of the promisor's motive for his promise, thus also be able to gauge his intended commitment in making the promise to him or her. At all events, it is only on some such basis as now advanced that we are at all able to explain the suggestion that a promise by an employer to his old employee, allowing the latter to continue rent-free in his old dwelling, would be a promise which cannot be arbitrarily withdrawn.[42]

We will also have seen that benevolent promises, designed as they are to assist or advance the promisee, so as to enable him to make (new) arrangements affecting his life, are accordingly understood to be acted on, if not immediately, then relatively soon: the promise tips the balance in favour of the promisee taking a particular course the promise envisages. The promisor knows that the promisee can only be encouraged to take this course, partly because this course is wanted, or at least not unwelcome to him, partly because the promisee is aware that the promisor is the only source from which assistance or support for this project can at all come. This, too, is the principal reason why it is utterly inappropriate to press benevolent promises into a bargain-mould; since the promisee is not bargaining for the assistance he craves; for having no 'value' to give in return except his gratitude, all he can do is to comply with the conditions set by the promisor, conditions like starting a marriage or career or living separate from the other spouse. It also follows that a promisee has no legal claim if the promise is not acted upon, for the promisee is then in no position to show actual material loss. And this is so whatever theory we adopt. Even estoppel-doctrine excludes the so-called 'unrelied-upon' promise, while consideration-theory, too, cannot here identify a 'detriment' if the promise is not acted on. A wholly executory promise of assistance which has not yet engaged action by the promisee therefore remains revocable by the promisor, precisely because the promisee's position remains unchanged.[43] This, again, shows the difference with bargain-promise where a promisor is liable for lost profits without

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[42] For this suggestion, see *Foster* v. *Robinson* [1950] 2 K.B. 149, 155-6.

[43] See the remarks in *Pettit* v. *Pettit* [1970] A.C. 806, per Lord Diplock.

the promisee having done anything except wait for the promise to be performed. A gift-promisee, needless to say, can still have expectations, even (to him) serious or important ones, which if disappointed will give him a right to a grievance, the promisor remaining under a moral obligation to give some explanation or apology for his breach. Yet though the promisor continues morally answerable, he is not now legally liable, and this—on the analysis here presented—because the promisee, even if rightly disappointed, is not left materially worse off. The promisee, in other words, has ample grounds for moral criticism, but he cannot take the promisor to court.

When, and how, a promisee becomes worse off is not always easy to say. If a father (A) says to his son (B) 'I'll give you $1,000 next Christmas', A can legally withdraw since B's existing position remains the same if the money is not forthcoming. Even if B did, in a manner of speaking, 'rely' on the promise (e.g. by incurring debts anticipating the $1,000 promised him), this would not be a relevant loss. On the other hand, a loss does become relevant if A's promise is one of imminent assistance for a specific project, so causing B to change his position accordingly. There are situations with more subtle facts, such as a situation that arose in a well-known English case which stands as authority for something quite different.[44] The facts were that a husband promised his wife £100 a year in maintenance after their divorce in 1943, though the couple had lived apart since 1939. This was no ordinary maintenance agreement; nor did the wife undertake to forbear from applying to the court for further support, neither had the husband requested her so to forbear. The wife pressed from time to time for payment of the promised sums, but she made no legal application of any sort, that is, not until 1950, nearly 7 years later. Probably the reason for this was that her income was anyhow greater than that of her husband; indeed his promise to pay the £100 p.a. was apparently only a symbolic act, as though accepting responsibility for the divorce. His promise to pay was held unenforceable on various grounds of no present interest. But a further explanation of the decision perhaps simply is that his promise did not in the circumstances amount to a promise of assistance, since in terms of actual financial support the promise made in fact no real difference to the wife; it did not bring about a change of position on her part, nor a change of life-style, thus produced no loss.

In more normal situations, however, the existence of a loss by the promisee is more easily ascertained. Of course different promises cause different expectations and therewith different sorts of loss. In bargain-promises, as already observed, the important expectation is that of gain or profit as part of an economic exchange, whereas in benevolent promises the expectation is of an *ex gratia* benefit on the strength of which one

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[44] *Combe* v. *Combe* [1951] 2 K.B. 215.

can reliably alter one's life. Nor, to mention this only in passing, is this application of the loss-principle to gratuitous promises entirely new at common law. Certain such promises resulting in loss, especially such as have to do with free services or favours, have long been held enforceable. Suppose A promises to do something for B, but then does it badly or not at all. A may promise to keep or carry B's property; or promise to act as a gratuitous agent, to effect (say) a policy of insurance for B. If A does these jobs incompetently, either by damaging B's property in his custody, or by failing to insure without telling B, it is indeed old law has it that A is liable for the loss.[45] Even where A does nothing (his fault being one described as 'non-feasance' rather than 'mis-feasance'), he is still liable if loss ensues. As a gratuitous agent A may notify B that he will not, or cannot, act as he promised he would; nonetheless A must still be careful not to leave B without an opportunity to take alternative steps. Thus A can, before actual loss, legally revoke his promise simply because his promise is a favour rather than a paid-for service; but once there is loss directly due to his breach, A's liability will stand, in fact to the full (commercial) extent of the loss incurred by B. Still it seems a mistake to regard these gratuitous promises as forerunners of, or as being support for, the benevolent promises we are concerned with here. In the first place, the former promises, though certainly gratuitous, are nevertheless commercial in the sense of being capable of causing commercial loss to the promisee; in the case of a benevolent promise, the relevant loss rather derives from a failure of further assistance or help. In the second place, what we know as the bargain-theory has always targeted gift-promises in particular; the triumph of the bargain-theory has always been understood as invalidating informal gift-promises yet, curiously enough, without intimating a similar invalidation of promises arising out of gratuitous bailment or gratuitous agency.[46]

We earlier remarked upon a special feature of benevolent promises, namely, their need to be modifiable or excusable as and when a promisor's circumstances change, including the circumstances obtaining as between promisor and promisee. Whereas bargain-promises in respect of which performance has generally to be strict, fully complying with the contracted terms (for the obvious reason that such a promise initiating as it does a future transaction is meant to make a promisee's chances, in a volatile market, more calculably predictable), benevolent promises have quite another design. Intended as these promises typically are to last for some time, in a continuing relationship, they must be able to take account of changing circumstances between the parties as and when changes occur.

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[45] Cf. *Coggs* v. *Bernard* (1703) 2 Ld. Raym. 909; *Wilkinson* v. *Coverdale* (1793) 1 Esp. 75; *Bainbridge* v. *Firmstone* (1838) 3 Ad. & El. 743.

[46] For a substantially different view, see K.C.T. Sutton, *"Promises and Consideration"*, in P.D. Finn (ed.), *Essays in Contract* (Sydney 1987) 35, 40, 53.

For just as it is unjust for A to disappoint B's expectations which as promisor he himself aroused, so B cannot, in a gratuitous or benevolent promise, rigidly insist on strict or full performance where circumstances change and performance would impose an unforeseen and disproportionate burden on the promisor. Unlike bargain or synallagmatic promises which, so to speak, embody the parties' mutual risks, a benevolent promisor does not by his promise agree to do what may become a pronounced hardship for him; his promise is limited by an assumption that performance will take place in circumstances staying roughly as they are. So a gift-promisee, though he may expect the promisor to act in good faith, cannot expect him to ruin or injure himself in performing his promise, come what may. Appropriate excuses have here long been recognised in other legal systems, in particular German and French law. In the former, very briefly, a promise of a gift is excusable where personal circumstances significantly change; so also where a promisor is no longer able to perform the promise, or give the assistance promised, while in both French and German a gift-promise becomes revocable (as does in fact also an executed gift) if the promisee (or donee) shows himself outrageously ungrateful—where, for example, he insults the promisor, or commits personal affronts.[47]

The common law, by contrast, lacks any corresponding principles, chiefly because of its primitive treatment of promises of gifts which, as already said, are either unenforceable as falling outside the bargain-theory, or even if enforceable are only covertly so, by way of a tortured contract or through estoppel, neither of which however invites the real problems relating to gratuitous promises to be squarely faced. An approach through contract is a sort of all-or-nothing affair: a valid contract has to meet a uniform set of conditions which do not at all discriminate between matters pertinent to bargains and such pertaining to gifts. And an approach through estoppel, though apparently more flexible, is more concerned with the protection of the promisee and his reliance than with the position of the promisor. Even so, it would not be altogether true to say the common law is entirely unable to recognise a performatory excuse where this would be equitably appropriate. If, to take an extreme example, uncle promises to give nephew $20,000 in two years, and nephew later wrecks uncle's living room in an angry rage, no one, not even the nephew would expect the uncle to remain under a duty to perform.[48] In a recent Australian case, earlier mentioned, where the relationship between promisor and promisee had broken down, there being no longer a relation (as Kirby P. expressed it) of 'congeniality' and 'commitment to a shared idea of horticulture' the so-called contract was held to be 'frustrated', though this was but a way of saying that the promise of a gift of land was,

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[47] B.G.B.s.519, 528 and 530; Code Civil, arts. 953-6.

[48] For this example see M. A. Eisenberg, Donative Promises (1979) 47 *Univ. of Chic. L. Rev.* 1,5.

in the given circumstances, to be regarded as a promise lapsed.[49] In other situations, as well, courts seem today more prepared to construe a benevolent promise of continuing assistance in the light of the actual capacities of the promisor. So a parental promise to assist a child at university might well be held to be terminable if the promisor ceases to be in a position to give that support;[50] just as a husband's promise to a wife for periodic support for household expenditures might be regarded, at least so we earlier argued, as modifiable as new circumstances demand, this being eminently a promise that cannot be out of touch with the husband's ability to pay or the family's changing needs. In estoppel, too, a court may now be more prepared to do equity not just to one party but to both. English law will now strive to prevent legal results from becoming 'unconscionable, inequitable or unjust'; and American law now similarly provides that estoppel 'may be limited as justice requires', both systems thus apparently making room for a promisor's just excuse without however saying so.[51]

5.

Two final problems remain. One has to do with a type of gratuitous or benevolent promise raising quite another difficulty. This is the well-known promise for a past service, the promise now being given to recompense the promisee for benefits already rendered to the promisor. Technically described as a promise for a *past* consideration, this has consistently been treated as being no consideration, from the sixteenth century to this day. There is no doubt that this rule expresses an important feature about bargain-promises: that unless promises initiate an expectation, they do not lead to a bargain, for they cannot merely confirm what has already been done. Yet since our business now is with promises of gifts, not bargains, our theoretical perspective has to change as well. In relation to gifts, it may then be seen, promises for past benefits, far from absurd as in bargains, are a very natural phenomenon, if only because benevolent promises often come out of gratitude after a particular event. For this reason such promises are not objectionable on moral grounds, because where a person confers a benefit upon another who thereupon promises a reward, the promisee can have every expectation of getting that reward; given the benefit already bestowed, there is again a sort of special relationship between promisor and promisee. But even if morally

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[49] *Beaton* v. *McDivitt*, supra, at note 39. The frustration-ground was advanced by Young J. and Mahoney J.A., (*ibid.* at 154, 177) the frustration being that the land was not rezoned as it was expected to be. But, as McHugh J.A. pointed out (ib. at 184-5), the rezoning by the council was the projected occasion rather than a condition of the gift. Hence the fact that no rezoning took place did not by itself really affect the promise as such.

[50] See *Jones* v. *Padavatton* [1969] 2 All E.R. 616, 622 where this particular point is left open, but such a result seems implied.

[51] For English law, see *Crabb* v. *Arun D.C.* [1976] Ch. 179; for American law see Restatement, Contracts 2d, s. 90(1); and for Australian law see Kirby P.'s adaptation of estoppel in *Beaton* v. *McDivitt*, supra at n. 39.

effective, we have to find out whether such promises are also legally enforceable.

To get at the precise problem one or two other situations should be cleared away. In the first place, there is the so-called 'executed' situation to which the 'past' rule does not apply. Where services are requested by A from B, his subsequent promise to pay so much for the services given is little more than a confirmation of the earlier (requested) agreement, together with a quantification of the value of the work done. In the second place, there can be services more 'past' than 'executed', without there being a contractual nexus between the two sides, but where the services nonetheless qualify as 'necessaries' or as given in 'an agency of necessity' for the other side; these, too, do not concern us here. So it is the third which is now our crucial case. Suppose, as indeed happened in a controversial American decision, that A, an employee, heroically saves B, his employer, from certain death, but is crippled for life doing it; and suppose that 'in consideration' of his services B promises A to care for him and to pay him a fortnightly allowance for the remainder of his life. This promise was held enforceable on the ground that B was under a 'moral obligation' or 'conscientious duty' to pay, since he had received a substantial benefit, one of infinitely greater value than any financial aid would have been; the benefit was much like a 'necessary', just as much as if a doctor had intervened to save his life; hence the subsequent promise was like 'an affirmance or ratification' of the benefits so received.[52] If the decision seems impeccable morally, it is more difficult to explain on ordinary contractual grounds. A contractual explanation here remains essentially incoherent; for putting it in contractual terms transforms the accord into a sort of bargain *ex post facto*, effectively neglecting its profoundly gratuitous character, so also leaving the element of the employer's gratitude or generosity quite unaccounted for. The position obviously is that B, the employer, makes his promise chiefly out of gratitude for his rescue as well as pity for A's grievous injuries. Hence it is to misdescribe B's promise as if it were an act of reciprocity, 'a kind of exchange' rather than a matter of compassion and benevolence; likewise it seems inappropriate to treat this case as something described as 'promissory restitution', as a case where restitution or unjust enrichment looms large, simply because it seems odd to regard B as unjustly enriched.[53]

The real question therefore is whether B's promise can be made enforceable just as it is, as a gratuitous and generous promise made in circumstances where the promisor has much reason to be grateful to the promisee. Our answer is that indeed it can. Just as a benevolent promise can give rise to a reliable expectation where the promise comes from

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[52] *Webb* v. *McGowin*, 27 Ala. App. 82, 168 So. 196 (1935).

[53] But see S. D. Henderson, "Promises Grounded in the Past: The Idea of Unjust Enrichment and the Law of Contracts" (1971) 57 *Virg. L. Rev.* 1115, 1157-8; for another view, C. Fried, *Contract as Promise* (Harvard 1981) 31-2.

a parent, or a close relative, from whom a promised benefaction seems utterly credible, so a sure expectation can arise where the promisor has already received a benefit from the promisee and the promisor merely wishes to express his gratitude. Unlike the case of a 'pure' gift-promise where the promisee usually has no particular reason to expect anything, here the promisee has good reason to suppose that the promise is meant seriously, that it is the sort of promise he can confidently expect to see performed. Moreover, just as any other promise, whether a promise of a gift or a bargain, cannot be a candidate for legal enforcement without satisfying what we called the loss principle, so the present promise must do so also,—except that in the present case that test is already satisfied, certain services having already been done: it is, in fact, in view of those acts or services, together with the loss they represent, that the promise of reward is made, it being also a remediable loss since the beneficiary's promise translates the benefit to him into money terms to which both sides agree.

The position arrived at bears some resemblance to the French *donation rémunérative*. In one French case A promised B a life annuity when B left to get married after many years of faithful service; in another A promised B a gratutity, B having looked after A during a long illness; both were held to offer a sufficient *cause*, thereby meeting the major requirement in French law for legally upholding any promise, whether a commercial or just a gratuitous one.[54] There was here a sufficient *cause* because A's promise was buttressed by his evident *intention libérale*, his intention to give some special reward to B; an evident such intention since the promise was to a former retainer who had rendered long and beneficial services. In the analysis here given, however, the emphasis is not so much on the promisor's own intention as on the promisee's expectation; it is the promisee who must be able to say, in this case as in others, that in the circumstances he has good cause or reason to expect the promise in the first place, for unless a promise is expectation-creative it cannot properly qualify as one.

A final problem, to be dealt with only cursorily now, relates to the possible requirement of form. Should it make a difference for legal enforcement if a gratuitous promise of whatever kind is clothed in some formality, either made with some solemnity, or made in a special writing like a deed? Traditional legal doctrine suggests that what you cannot do by informal or simple promises, you can yet achieve by formal ones. But the immediate wonder is why special formalities should make a difference. How can it matter if a gratuitous promise is formally contained in a document as well as signed or sealed or stamped?

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[54] D.P. 1846. 1.159; D.P. 1885. 2.101. And see more generally on this aspect of *cause*, J. Ghéstin, *Les Obligations: Le Contrat*, (Paris, 1980), 528ff., 576ff.

As everyone knows, formalities can be helpful for evidentiary purposes, furnishing as they do black-on-white evidence of the terms of a promise in case these terms are in dispute. Then formalities can also perform a cautionary function in that the mere requirement of complying with a (prescribed) form can deter a person from making too hasty or impulsive a promise; submitted to solemnity, the promisor may act with more care and deliberation, since the special occasion may make him think again. But of course a promise may be perfectly clear and undoubted both from an evidentiary and cautionary point of view just as it is, without form, without the promisor even disputing that the promise itself is a valid one. Still the law may require that the promise be nonetheless in writing and signed; but in that case the formality required performs (what Fuller called) a 'channelling' function since in complying with this formality, public notice is given, so to speak, that the promise is to have certain legal effects—here the effect of becoming enforceable—which without the formality the promise would not have.[55] The channelling function, in other words, enables us to make a transaction we could not otherwise make; indeed it introduces a new device, just as making a will or establishing a trust are other devices of this sort. Yet it also follows that if such a formal promise is now taken to be legally effective, this is so by virtue not of the promise but of the channelling. A formal promise still indicates that this transfer originates with the donor's consent, but as a promise it no longer functions as a speech-act with its own performative effects; it rather becomes a piece of legal machinery. A promise as such is not really helped by form.

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[55] L. L. Fuller, "Consideration and Form" (1941) 41 *Col. L. Rev.* 799, 801, 803.