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An Agricultural Law Research Article

## **Oral Contracts for the Sale of Agricultural Products**

by

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## ORAL CONTRACTS FOR THE SALE OF AGRICULTURAL PRODUCTS

*Since the first colonists arrived in America, those who were farmers have followed a custom of buying and selling agricultural products through the use of oral contracts. This comment will examine recent decisions by the South Dakota Supreme Court concerning the use of the Statute of Frauds as a bar to the enforcement of these contracts, the doctrines of promissory and equitable estoppel as methods of avoiding the operation of the Statute of Frauds, and the proper remedy to be applied in these situations.*

### INTRODUCTION

The dependence of the South Dakota economy on the agricultural sector is clearly identifiable. Traditionally, agriculture has been responsible for the employment of more people and the generation of more income than any other industry in the private sector of the state's economy.<sup>1</sup> In a recent year, it was estimated that approximately 65,000 South Dakotans were directly employed in farm and ranch operations, a figure equal to nineteen percent of the state's total labor force.<sup>2</sup> Even more significant is the fact that, for every person employed in farming, there are three employed in farm dependent services in the state, further highlighting the importance of agriculture.<sup>3</sup> Recent compilations show that twenty-nine percent of South Dakota's total gross state product and twenty-three percent of the state's total personal income were derived from the agricultural sector of the state's economy.<sup>4</sup>

With an awareness of the importance of agriculture comes the realization that, as a matter of course, those most closely associated with agriculture, the farmers, purchase and sell large quantities of goods, commodities, and farm products in the conduct of their day to day business transactions. A significant number of these transactions culminate in oral contracts, which are often closed by a handshake of the parties involved. With the current increase in all varieties of litigation, it is inevitable that a number of oral contracts for the sale of agricultural products have been the subject of adjudication.<sup>5</sup> The litigation involving oral contracts for the sale of agricultural products (specifically grain) has intensified with the

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1. SOUTH DAKOTA STATE PLANNING BUREAU, POLICY PLAN FOR AGRICULTURE 1 (1975).

2. *Id.* at 2.

3. *Id.*

4. *Id.*

5. Farmers Cooperative Ass'n. v. Dobitz, — S.D. —, 240 N.W.2d 116 (1976), Farmers Elevator Co. of Elk Point v. Lyle, — S.D. —, 238 N.W.2d 290 (1976), Farmers Cooperative Elevator Co. of Revillo v. Johnson, — S.D. —, 237 N.W.2d 671 (1976).

large fluctuations which have occurred in the farm commodity markets in recent years.<sup>6</sup>

As a result of the highly volatile swings in the commodity market, the likelihood exists that there will continue to be a significant amount of litigation regarding oral contracts for the sale of grain. In consideration of these circumstances, this comment will examine the use of the Statute of Frauds as a bar to the enforcement of these oral contracts, the use of the doctrines of equitable and promissory estoppel as a restraint on the imposition of the Statute of Frauds, and the determination of the proper measure of damages. Examination of recent cases involving oral contracts<sup>7</sup> reveals the importance of these issues. In these cases a common sequence of events occurs which is begun by the pleading of the Statute of Frauds by the defendant. This is countered by the plaintiff invoking either the doctrine of equitable estoppel or promissory estoppel. Should the plaintiff prevail, the matter of the proper measure of damages is considered by the court. The proper use of these doctrines, therefore, becomes exceedingly important in oral contracts for the sale of agricultural products.

#### THE STATUTE OF FRAUDS

The substance of the South Dakota Statute of Frauds<sup>8</sup> is that all contracts for the sale of goods that have a value or price exceeding five hundred dollars are required to be in writing. This is qualified by the provision that any writing signed by the parties indicating the existence of a contract is sufficient to enforce the contract.

The progenitor of the Statute of Frauds as enacted in South Dakota was the English Statute entitled, an Act for the Prevention of Frauds and Prejudices.<sup>9</sup> This Statute was enacted by Parliament in 1676 and became effective in the English Statutes in this country at the same time as it became effective in Great Britain.<sup>10</sup>

The constitutionality of a Statute of Frauds has never been

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6. Aberdeen American News, April 16-June 26, 1973.

7. *Farmers Cooperative Ass'n. v. Dobitz*, — S.D. —, 240 N.W.2d 116 (1976), *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976), *Farmers Cooperative Elevator Co. of Revillo v. Johnson*, — S.D. —, 237 N.W.2d 671 (1976).

8. S.D.C.L. § 57-3-1 (1967).

Except as otherwise provided in §§ 57-3-2 and 57-3-3 a contract for the sale of goods for the price of five hundred dollars or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this section beyond the quantity of goods shown in such writing.

9. *McIntosh v. Murphy*, 52 Hawaii 29, —, 469 P.2d 177, 179 (1970).

10. *Kline v. Lightman*, 243 Md. 460, —, 221 A.2d 675, 681-82 (1966).

seriously contested, although the courts have frequently pointed out that while the legislature may not interfere with the absolute, individual right to contract, except on the ground of public policy, it may regulate the manner in which that right shall be exercised.<sup>11</sup> Similarly, courts have also held that statutes which render enforceable, or give validity to, a contract which would otherwise be within the provisions of the Statute of Frauds, are constitutional.<sup>12</sup>

The purpose of the Statute of Frauds is to prevent fraud and perjury in the enforcement of obligations depending for their evidence on the unassisted memory of witnesses. It fulfills this function by regulating the formalities of an enforceable contract.<sup>13</sup> Specifically, the object of the statute is to prevent fraud and perjury in establishing a verbal agreement not to be performed within a year.<sup>14</sup> In regard to this provision of the statute, it must appear that there is a negation of the right or capability of performance within the year.<sup>15</sup> According to many decisions, in order for this portion of the statute to apply, it must appear that the parties intended when they made the contract that it must not be performed within the year.<sup>16</sup>

The South Dakota Statute of Frauds, as enacted, is similar to the statute as found in many other states that require contracts of sale to be in writing. In South Dakota this provision is, however, restricted to contracts which are for a sum in excess of five hundred dollars. This dollar amount may be strictly adhered to, as in *Cox v. Cox*.<sup>17</sup> In that decision the Supreme Court of Alabama held that oral contracts, which were entered into between a cotton grower and a cotton purchaser and involved the purchase of cotton for a sum in excess of five hundred dollars, were in violation of the Statute of Frauds and were, therefore, unenforceable. Nevertheless, the writing requirement of the statute has been waived, in some instances, in spite of the fact that the contract involved a sum exceeding five hundred dollars. Under a fact situation substantially similar to that found in *Cox v. Cox*, the North Dakota Supreme Court held that the writing requirement is waived when there is proof of the contract in question, or the existence of one was admitted by the other party to the agreement.<sup>18</sup> Evidence of the existence of a contract may consist of the testimony of witnesses to the transaction and that of the parties involved.<sup>19</sup> Additional proof of the contract may be derived from circumstances surrounding the formation of the contract. An example of this would be

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11. 16 AM. JR. 2d. *Constitutional Law* § 378 (1974).

12. *Hurley v. Hurley*, 110 Va. 31, 65 S.E. 472 (1909).

13. *Fairall v. Arnold*, 226 Iowa 977, 285 N.W. 664 (1939).

14. *Warner v. Texas & P.R. Co.*, 13 U.S. App. 236 (1896).

15. 72 AM. JUR. 2d. *Statute of Frauds* § 7 (1974).

16. *Yates v. Ball*, 132 Fla. 132, 181 So. 341 (1938).

17. 292 Ala. 106, 289 So. 2d 609 (1974).

18. *Dangerfield v. Markel*, 222 N.W.2d 373 (N.D. 1974).

19. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976).

the act of arranging for the trucking of the grain by the defendant.<sup>20</sup> In this regard, however, it is important to note that evidence of a custom or usage must not be used in a manner to defeat the statute by demonstrating that the custom is to enter into oral contracts.<sup>21</sup>

The provision of the Statute of Frauds that requires a writing permits the courts to guard not only against the dishonesty of parties and the perjury of witnesses, but also against the misunderstandings or mistakes of honest men.<sup>22</sup> The writing requirement of the statute facilitates the attainment of the purpose of the statute by simply preventing a party from being held responsible, by oral and perhaps false testimony, for a contract which he claims he never made. The writing requirement of the Statute of Frauds may be satisfied by a memorandum, wholly untechnical in form. The memorandum may consist of any kind of writing from a solemn deed to a mere hasty note, which is signed by the parties.<sup>23</sup>

In those jurisdictions where the Uniform Commercial Code is in effect, there is an additional provision in the Statute of Frauds. It provides that between merchants if, within a reasonable time, a writing in confirmation of the contract and sufficient against the sender is received and the party receiving it has reason to know its contents, it satisfies the writing requirement.<sup>24</sup> In this area, the Kansas Supreme Court has recently held that a wheat farmer is not a merchant within the meaning of the Statute of Frauds.<sup>25</sup> Therefore, the requirement that a contract for the sale of wheat be in writing and signed was not obviated by the farmer's failure to object to a written confirmation of an oral contract. Whether a particular farmer is a merchant within this context is a fact question.<sup>26</sup> Relevant indicia to be considered in making that determination include the professionalism, special knowledge, and commercial experience of the parties.<sup>27</sup> The application of these criteria is exemplified by the decision in *Loeb and Company Inc. v. Schreiner*.<sup>28</sup> In its holding the court stated that a cotton farmer, although astute in selling his own product, was not professional enough to be a merchant. In arriving at its decision the court developed a test consisting of the following three components,

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20. *Id.* at —, 238 N.W.2d at 292.

21. *Dangerfield v. Markel*, 222 N.W.2d 373, 378 (N.D. 1974).

22. 72 AM. JUR. 2d. *Statute of Frauds* § 285 (1974).

23. *Kopp v. Reiter*, 146 Ill. 437, 34 N.E. 942 (1893).

24. U.C.C. § 2-201.

25. *Decatur Cooperative Ass'n. v. Urban*, 219 Kan. 171, —, 547 P.2d 323, 328 (1976).

26. *Nelson v. Union Equity Co-operative Exchange*, 536 S.W.2d 635, 641 (Tex. 1976).

27. *Decatur Cooperative Ass'n. v. Urban*, 219 Kan. 171, 547 P.2d 323 (1976).

28. — Ala. —, 321 So. 2d 199 (1975).

one of which a farmer must do to be considered a merchant: (1) deal in goods of kind; (2) by his occupation hold himself out as having knowledge or skill peculiar to the practices of the goods in question; or (3) employ an agent or broker who by his occupation holds himself out as having knowledge or skill.<sup>29</sup>

In an action at law on a contract or for damages for a breach of contract, it is not necessary for the plaintiff to allege affirmatively that the contract in question was in writing, even though this is required by the Statute of Frauds. Additionally, the plaintiff is not required to show that the contract complies with the requirements of the Statute.<sup>30</sup> The Statute of Frauds must be claimed and set up by the defendant as an affirmative defense; as such, if it is not established, it is considered waived. In order to use the statute as a defense, the defendant must raise the statute by appropriate pleading. This must be done since a contract is not absolutely void, but only voidable at the election of the defendant against whom the contract is to be enforced.<sup>31</sup> As a result, the defendant cannot raise a general objection to the introduction of evidence at trial which would show the existence of a contract unless the statute has been pleaded.

South Dakota Codified Laws section 15-6-8(c) provides the procedure for raising the Statute of Frauds as a defense.<sup>32</sup> The method for raising the statute as a defense is, simply, that a party shall set forth affirmatively the Statute of Frauds. To this end it is usually sufficient if the defendant pleads the general issue, makes a general denial, or denies the making or execution of the contract.<sup>33</sup>

A recent South Dakota Supreme Court decision, however, clarified the pleading of the statute by restricting the general rule. In its decision in *Farmers Cooperative Elevator of Revillo v. Johnson*<sup>34</sup> the court stated that the Statute of Frauds was improperly pleaded by an answer which alleged that the defendant had entered into no contractual obligation, either written or oral, as alleged by the plaintiff. In arriving at its holding the court inter-

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29. *Id.* at —, 321 So. 2d at 201-02.

30. *Rubin v. Irving Trust Co.*, 305 N.Y. 288, 113 N.E.2d 424 (1953).

31. *Stokes v. Bryan*, 42 Ala. App. 120, 154 So.2d 754 (1963).

32. S.D.C.L. § 15-6-8(c) (1967).

In pleading to a preceding pleading, a party shall set forth affirmatively accord and satisfaction, arbitration and award, assumption of risk, contributory negligence, discharge in bankruptcy, duress, estoppel, failure of consideration, fraud, illegality, injury by fellow servant, laches, license, payment, release, *res judicata*, statute of frauds, statute of limitations, waiver and any other matter constituting an avoidance or affirmative defense. When a party has mistakenly designated a defense as a counterclaim or a counterclaim as a defense, the court on terms, if justice so requires, shall treat the pleading as if there had been a proper designation.

33. *Thomas v. Pope*, 380 Ill. 206, 43 N.E.2d 1004 (1942).

34. — S.D. —, 237 N.W.2d 671 (1976).

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preted South Dakota Codified Laws section 15-6-8(c) as requiring a pleading to a preceding pleading to be set forth affirmatively.<sup>35</sup> The court concluded that more is required than a general denial of the complaint; it is necessary that an affirmative plea, at a minimum, state that the subject matter of the complaint falls within the provisions of the Statute of Frauds and further assert that there is no writing covering the matter in question and signed by the party charged.<sup>36</sup>

Recently the South Dakota Supreme Court dealt with the question of an oral contract for the sale of grain in *Farmers Elevator Co. of Elk Point v. Lyle*.<sup>37</sup> In this case, the plaintiff and defendant entered into an oral contract for the sale of corn. The defendant later breached the contract when a substantial increase in the price of corn occurred.<sup>38</sup> As this involved an oral contract, the Statute of Frauds was properly raised as a bar to recovery. The supreme court noted, however, that the protection afforded under the statute could be superseded by equitable principles.<sup>39</sup> In this regard the supreme court held that equitable estoppel would act as a bar to invoking the statute, thereby sustaining the lower court's decision in favor of the plaintiff.<sup>40</sup>

Another decision involving the Statute of Frauds as a bar to the enforcement of an oral contract for the sale of grain was recently handed down by the Supreme Court of Minnesota.<sup>41</sup> In this suit, the court held that even though the grain elevator relied upon an oral agreement with a farmer for the purchase of grain in making a resale of the same quantity of grain, equitable estoppel did not prevent the defendant from asserting the Statute of Frauds as a defense. By so holding, the Minnesota court arrived at a decision exactly opposite that which was reached by the South Dakota court in *Lyle*, even though the factual settings were virtually identical.<sup>42</sup>

In the context of the recent South Dakota and Minnesota decisions,<sup>43</sup> the equitable nature of the Statute of Frauds becomes apparent. These decisions demonstrate the discretion exercised by the courts in determining whether the interests of justice and the prevention of fraud require the use of the Statute of Frauds as a defense.

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35. S.D.C.L. § 15-6-8(c) (1967).

36. *Farmers Cooperative Elevator Co. of Revillo v. Johnson*, — S.D. —, 237 N.W.2d 671 (1976).

37. — S.D. —, 238 N.W.2d 290 (1976).

38. *Id.* at —, 238 N.W.2d at 292.

39. *Id.* at —, 238 N.W.2d at 293.

40. *Id.* at —, 238 N.W.2d at 294.

41. *Sacred Heart Farmers Cooperative Elevator v. Johnson*, — Minn. —, 232 N.W.2d 921 (1975).

42. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976), *Sacred Heart Farmers Cooperative Elevator v. Johnson*, — Minn. —, 232 N.W.2d 921 (1975).

43. *Id.*

## ESTOPPEL

Estoppel is a bar which precludes a party from denying the truth of a fact. It implies that one who by his deed or conduct has induced another to act in a particular manner will not be permitted to adopt an inconsistent attitude or course of conduct and thereby cause loss or injury to another.<sup>44</sup> In this respect, it may be said that estoppel is a rule of equity and at the same time a conclusion of law.<sup>45</sup>

When considering whether estoppel should be applied, *Kraft v. Corson County*<sup>46</sup> provides a rule of thumb. In this decision the court stated that the doctrine of estoppel is founded upon the principles of morality and fair dealing, thereby establishing the parameters inside of which an estoppel may be invoked. The court has further delineated these boundaries in many of its holdings.<sup>47</sup> The cornerstones, as established by the court, upon which an estoppel may be based are acts or conduct that cause a justifiable reliance.<sup>48</sup> These elements of the estoppel must be proven by clear and convincing evidence,<sup>49</sup> or the action will fail.

*Equitable Estoppel*

In particular, equitable estoppel may be defined as a principle by which a party who knows or should know the truth is absolutely precluded both at law and in equity from denying or asserting the contrary.<sup>50</sup> This has the effect of precluding an individual from asserting what would otherwise be his rights both in law and equity. It arises where a person, by his acts, representations, admissions, or silence induces another to believe that certain facts exist. Equitable estoppel is invoked when the plaintiff justifiably relies to his prejudice upon purported facts.<sup>51</sup>

The elements of equitable estoppel that need to be proven to bar the Statute of Frauds are: (1) that the oral agreement must be established by satisfactory evidence; (2) that the party asserting rights under the agreement must have relied thereon and have indicated such reliance by the performance of acts unequivocally referable to the agreement; and (3) that because of his change of position enforcing the Statute will subject the party to unconscionable hardship and loss.<sup>52</sup>

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44. *Furgey v. Beck*, 244 Ala. 281, 13 So. 2d 179 (1943).

45. *Wisel v. Terhune*, 201 Okla. 231, 204 P.2d 286 (1949).

46. 71 S.D. 382, 24 N.W.2d 643 (1946).

47. See, e.g., *Kelly v. Gram*, 73 S.D. 11, 38 N.W.2d 460 (1949).

48. *Id.* at 24, 38 N.W.2d at 466.

49. *Farmers Mutual Automobile Ins. Co. v. Bechard*, 80 S.D. 237, 122 N.W.2d 86 (1963).

50. *Sanborn v. Maryland Casualty Co.*, 255 Iowa 1319, 125 N.W.2d 758 (1964).

51. *Wichita Fed. Savings & Loan Ass'n. v. Jones*, 155 Kan. 821, 130 P.2d 556 (1942).

52. *Federal Land Bank of Omaha v. Matson*, 68 S.D. 401, 5 N.W.2d 314 (1942).



In considering the elements of proof necessary to establish an equitable estoppel, it must be established that the contract did in fact exist. In *Cargill Inc., Marketing Division v. Hale*<sup>53</sup> the court held that where the defendant in a breach of contract action answered "Yes, Sir" to plaintiff's question "Didn't you agree to sell these beans to plaintiff's manager over the phone for a certain price?" there was sufficient testimony to constitute an admission that there was a contract to sell the soybeans to the plaintiff. Thus the defendant was prohibited from asserting the Statute of Frauds. The court in *Dangerfield v. Markel*<sup>54</sup> took a similar stance when it held that an oral contract for the sale of goods in excess of five hundred dollars was enforceable if it was admitted by the other party to the agreement. A recent South Dakota decision<sup>55</sup> held that the testimony of a witness who overheard the agreement plus a brief memo, were sufficient proof that the contract did actually exist. Although the memo did not satisfy the writing requirement because it was not signed by the contracting parties, it did help establish the existence of the contract.

The second element of proof, that of reliance upon the contract, was illustrated in *Oxley v. Ralston Purina Co.*,<sup>56</sup> where an action was brought by a farmer against the Ralston Purina Company for breach of an oral contract. The court held that where it could be shown that the farmer had relied upon the oral agreement and had made extensive investments for the purpose of carrying out the agreement, it should be enforced under the theory of equitable estoppel. Another decision illustrating this element of proof is *Babcock v. McKee*.<sup>57</sup> In that case, the court held that there must be a clear, unequivocal and decisive act or acts showing an intention to relinquish an existing right in reliance upon the oral agreement.

The third element of proof, that of unconscionable hardship or loss, is demonstrated by *Dangerfield v. Markel*.<sup>58</sup> This suit arose from the defendant's breach of an oral contract for the sale of potatoes to the plaintiff. In this instance, the court held that where one party suffers an unjust or unconscionable injury or loss, as in this action in which damages were placed at 96,675 dollars, equitable estoppel would be applied to bar the Statute of Frauds.

A recent South Dakota decision, in which the Court followed the doctrine of equitable estoppel in reaching its holding, was *Farmers Elevator Co. of Elk Point v. Lyle*.<sup>59</sup> The court affirmed

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53. 537 S.W.2d 667 (Mo. 1967).

54. 222 N.W.2d 373 (N.D. 1974).

55. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976).

56. 349 F.2d 328 (6th Cir. 1965).

57. 70 S.D. 442, 18 N.W.2d 750 (1945).

58. 222 N.W.2d 373 (N.D. 1974).

59. — S.D. —, 238 N.W.2d 290 (1976).

the three elements necessary to establish an equitable estoppel. Another line of cases, however, has included a fourth element that must exist in order to have an equitable estoppel.<sup>60</sup> In *Lambert v. Bradley*<sup>61</sup> the South Dakota Supreme Court identified the fourth element. The court stated that in order to constitute an equitable estoppel, false representations or concealment of material facts must exist and have been made with the intention that they would be relied upon.

When the required elements of proof are present, equitable estoppel may be plead.<sup>62</sup> Unless the matter constituting the estoppel is apparent on the face of the pleading, the doctrine must be specially pleaded<sup>63</sup> when the opportunity to do so arises.<sup>64</sup> If this is not done, evidence of the equitable estoppel may be deemed inadmissible.<sup>65</sup> But if the matter constituting the equitable estoppel is readily apparent on the face of the pleading, it need not be specially pleaded.<sup>66</sup> If a pleading is required, it should have a formal commencement and conclusion, and contain a claim that the Statute of Frauds should not be invoked, along with a statement of the facts constituting the equitable estoppel.<sup>67</sup>

### *Promissory Estoppel*

Promissory estoppel arose from the same equitable principal which gave rise to the seemingly indistinguishable doctrine of equitable estoppel.<sup>68</sup> Promissory estoppel grew out of equitable estoppel, due to the fact that a mere promise to do something in the future, even if relied upon, is unenforceable. The doctrine of equitable estoppel has been held to apply only where the representation by the person to be estopped was made as to a present or past fact. This rule has been relaxed in situations where it was intended by the promisor that his promise would be relied upon. This relaxation of the equitable estoppel requirement as to past or present requirements is called promissory estoppel.<sup>69</sup>

The prerequisites for a promissory estoppel are set forth in the Restatement of Contracts Section 90.<sup>70</sup> The section provides four requirements: (1) there must be a promise; (2) there must be a reasonable expectation that the promise will induce action or

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60. *Spitzer v. Spitzer*, 84 S.D. 147, 168 N.W.2d 718 (1969).

61. 73 S.D. 316, 42 N.W.2d 606 (1950).

62. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976).

63. S.D.C.L. § 15-6-8(c) (1967).

64. *Kelly v. Gram*, 73 S.D. 11, 38 N.W.2d 460 (1949).

65. *Whitmore v. Stephens*, 48 Mich. 573, 12 N.W. 858 (1882).

66. *Safford v. Flynn*, 133 Neb. 213, 274 N.W. 461 (1937).

67. 28 AM. JUR. 2d *Estoppel & Waiver* § 139 (1974).

68. *Id.*

69. 56 A.L.R.3rd. 1037 (1974).

70. RESTATEMENT (SECOND) OF CONTRACTS § 90 (1972).

forbearance by the promisee; (3) the promise must in fact induce the action or forbearance reasonably foreseen; and (4) the promise will be enforced only to avoid injustice.

Whenever considering a promissory estoppel, its limits should always be noted. The reason for the doctrine is to avoid an unjust result, therefore its reason defines its limits<sup>71</sup> To that end, there would be no injustice in a refusal to enforce a gratuitous promise where the loss suffered in reliance is negligible, nor where the promisee's action in reliance is unreasonable. The limits of promissory estoppel are: (1) the detriment suffered in reliance must be substantial in an economic sense; (2) the substantial loss to the promisee in acting in reliance must have been foreseeable by the promisor; and (3) the promisee must have acted reasonably in justifiable reliance on the promise as made.<sup>72</sup>

When considering whether promissory estoppel is a basis for avoidance of the Statute of Frauds, the limits of the doctrine and the proof requirements should always be borne in mind.<sup>73</sup> When establishing a promissory estoppel, it is first necessary to prove the existence of the promise and that it is one which the promisor should reasonably expect to induce action or forbearance on the part of the promisee.<sup>74</sup> After the existence of the promise has been proven, the reliance by the plaintiff must next be shown.<sup>75</sup>

Once proof of a promise has been demonstrated, the degree or amount of reliance becomes very important. In many, but not all, instances the reliance must be substantial. In *Macox v. Rainoldi*,<sup>76</sup> the plaintiff's expenditures of over twenty thousand dollars in reliance upon a promise were considered substantial enough to invoke a promissory estoppel. In another decision, the reliance of a contractor on a bid was considered sufficient to impose promissory estoppel.<sup>77</sup> This, then, illustrates the fact that reliance can take many forms, as long as the detriment that ensues is significant.

In making the decision whether to plead promissory estoppel or equitable estoppel, one should consider the elements of each estoppel in light of the facts at hand. The primary distinction between equitable and promissory estoppel is provided by the line of cases that have holdings similar to the decision of the court in *Weaver v. Bauer*.<sup>78</sup> It is important to note that these cases require some act or conduct of the party estopped, which misled the party

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71. 56 A.L.R.3rd 1037 (1974).

72. L. SIMPSON, *CONTRACTS*, § 61 (2d ed. 1965).

73. 56 A.L.R.3d 1037 (1974).

74. *McIntosh v. Murphy*, 52 Hawaii 29, 469 P.2d 177 (1970).

75. *In Re Field's Estate*, 11 Misc. 2d 427, 172 N.Y.S.2d 740 (1958).

76. 163 Cal. App. 2d 383, 329 P.2d 599 (1958).

77. *Northwestern Engineering Co. v. Ellerman*, 69 S.D. 397, 10 N.W.2d 879 (1943).

78. 76 S.D. 401, 79 N.W.2d 361 (1956).

asserting the equitable estoppel. The court in *Spitzer v. Spitzer*<sup>79</sup> stated the requirement to be fraud. There is another line of cases,<sup>80</sup> however, that have followed a definition of equitable estoppel which is very similar to the definition of promissory estoppel.<sup>81</sup> The importance of interpreting what elements of proof are required for each respective estoppel becomes evident in a case such as *Farmers Elevator Co. of Elk Point v. Lyle*.<sup>82</sup> If one is in a jurisdiction in which fraud or misrepresentation are required as elements of an equitable estoppel, one should not use *Lyle* as precedent. If fraud or misrepresentation are requirements, then a case with a similar factual setting should be decided upon the basis of promissory estoppel. In light of the different evidentiary requirements, it would appear that it is better to plead promissory estoppel under similar circumstances. The importance of pleading the correct estoppel is highlighted by a recent decision involving an oral contract for the sale of agricultural products, in which the court held that equitable estoppel did not bar the imposition of the Statute of Frauds, as there was no proof of fraud or misrepresentation.<sup>83</sup>

#### REMEDY

In regard to the proper measure of damages, the South Dakota Supreme Court has been most generous in awards in recently litigated cases.<sup>84</sup> In one instance, the court held that the cover purchases made by the plaintiff were reasonable. These purchases were made on two dates, nine and twenty-two days after the date when the contract was denied by the defendant.<sup>85</sup>

To determine what the correct measure of damages should be, it is first necessary to examine the relevant law. South Dakota Codified Law section 57-8-28<sup>86</sup> defines the buyer's remedy in

79. 84 S.D. 147, 168 N.W.2d 718 (1969).

80. See, e.g., *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976).

81. L. SIMPSON, *CONTRACTS*, § 61 (2d ed. 1965).

82. — S.D. —, 238 N.W.2d 290 (1976).

83. *Sacred Heart Farmers Cooperative Elevator v. Johnson*, — Minn. —, 232 N.W.2d 921 (1975).

84. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976), *Farmers Cooperative Ass'n. v. Dobitz*, — S.D. —, 237 N.W.2d 671 (1976).

85. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290 (1976).

86. S.D.C.L. § 57-8-28 (1967).

Where the seller fails to make delivery or repudiates or the buyer rightfully rejects or justifiably revokes acceptance then with respect to any goods involved, and with respect to the whole if the breach goes to the contract, the buyer may cancel and whether or not he has done so may in addition to recovering so much of the price as he has paid (1) "Cover" and have damages under §§ 57-8-31 to 57-8-33, inclusive, as to all goods affected whether or not they have been identified to the contract; or (2) Recover damages for nondelivery as provided in this chapter.

general as being the right of justifiable non-acceptance or cover. Another relevant statute is South Dakota Codified Law section 57-8-31<sup>87</sup> which provides that a buyer may make a cover purchase if it is in good faith and made without unreasonable delay. South Dakota Codified Law section 57-8-32<sup>88</sup> states that the buyer may recover the difference between the cost of cover and the contract price.

In South Dakota, authority for the award of cover as a remedy is found in *Thorstenson v. Mobridge Iron Works Co.*<sup>89</sup> In this case the court held that the buyer had the right to cover by making, in good faith and without unreasonable delay, any reasonable purchase of substitute goods. The court further stated that the buyer may recover the difference between the cost of cover and the contract price, together with any incidental or consequential damages.

Although the above statutory and case law suggests that cover is a proper remedy for a breach by the seller, it also raises the question of what is proper cover. The Uniform Commercial Code section 2-712, Comment 2<sup>90</sup> provides that the test of proper cover is whether, at the time and place, the buyer acted in good faith and in a reasonable manner. It is immaterial that hindsight may later prove that the method of cover used was not the cheapest or most effective. Furthermore, Comment 2<sup>91</sup> provides that the requirement is not intended to limit the time necessary for the buyer to look around and decide how he may best cover. The test, then, is one of reasonable time and seasonable action. Comment 2,<sup>92</sup> therefore, may be interpreted as requiring a merchant buyer to observe reasonable commercial standards of fair dealing in the trade.<sup>93</sup> Additionally, there is a presumption, unless rebutted, that the covering buyer acts in good faith.<sup>94</sup>

The question of a timely cover is still unsettled, although its importance cannot be overestimated in a market in which the price is increasing almost daily. In light of this fact the court's decision in *Oloffson v. Coomer*<sup>95</sup> becomes exceedingly important in deter-

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87. S.D.C.L. § 57-8-31 (1967). "After a breach . . . , the buyer may "cover" by making in good faith and without unreasonable delay any reasonable purchase of or contract to purchase goods in substitution for those due from the seller."

88. S.D.C.L. § 57-8-32 (1967). "The buyer may recover from the seller as damages the difference between the cost of cover and the contract price together with any incidental or consequential damages . . . , but less expenses saved in consequence of the seller's breach."

89. 87 S.D. 358, 208 N.W.2d 715 (1973).

90. U.C.C. § 2-712, Comment 2 (1962).

91. *Id.*

92. *Id.*

93. J. WHITE AND R. SUMMERS, HANDBOOK OF THE LAW UNDER THE UNIFORM COMMERCIAL CODE, § 6-2, 168-75 (1972).

94. *Id.* at 178.

95. 11 Ill. App. 3d 918, 296 N.E.2d 871 (1973).

mining the length of a commercially reasonable time period. In that case, the court held that, where the seller unequivocally breached the oral contract on June third, and cover was easily and immediately available to the buyer in the market, it would have been unreasonable for the buyer to await the seller's performance rather than to effect cover immediately. The court went on to state that June third would be the last possible day on which the buyer could effect cover.<sup>96</sup> Therefore, if the breach is unequivocal, the commercially reasonable time expires very quickly, depending upon the availability of cover.

Using this case as precedent, it seems that when one is dealing with agricultural products, which as a rule are fungible, there is usually a ready market in which cover can be easily effected. Thus, in these situations, it would appear to be the better rule that the buyer should be required to cover very shortly after the seller has repudiated the oral contract.<sup>97</sup> The commercial reasonableness of such a rule is readily apparent in a volatile market.<sup>98</sup>

#### CONCLUSION

Oral contracts for the sale of agricultural products present a wide variety of issues. The foremost of these is whether the Statute of Frauds will be used as a defense. Conversely, the question also arises whether promissory or equitable estoppel will be allowed as a bar to the Statute. These issues are determined on a case by case basis depending upon which elements of each respective doctrine are present. Additionally, should the plaintiff prevail, the issue of the proper measure of damages must be adjudicated by the court.

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96. *Id.* at —, 296 N.E.2d at 875.

97. *Farmers Elevator Co. of Elk Point v. Lyle*, — S.D. —, 238 N.W.2d 290, 295 (1976).

98. *Aberdeen American News*, April 16-June 26, 1973.

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