

Spring 1972

Should a Beneficiary Be Allowed to Invoke Promisee's Reliance to Enforce Promisor's Gratuitous Promise?

Follow this and additional works at: <https://scholar.valpo.edu/vulr>



Part of the [Law Commons](#)

Recommended Citation

Should a Beneficiary Be Allowed to Invoke Promisee's Reliance to Enforce Promisor's Gratuitous Promise?, 6 Val. U. L. Rev. 353 (1972).

Available at: <https://scholar.valpo.edu/vulr/vol6/iss3/6>

This Notes is brought to you for free and open access by the Valparaiso University Law School at ValpoScholar. It has been accepted for inclusion in Valparaiso University Law Review by an authorized administrator of ValpoScholar. For more information, please contact a ValpoScholar staff member at scholar@valpo.edu.



SHOULD A BENEFICIARY BE ALLOWED TO INVOKE PROMISEE'S RELIANCE TO ENFORCE PROMISOR'S GRATUITOUS PROMISE?

INTRODUCTION

Suppose that Ed, Ben's poor but generous uncle, has decided that he will give Ben \$500 from money that Ed has saved over the years. On his way to Ben's house, Ed encounters Ralph, who is a friend of both Ben and Ed. Ralph, upon hearing Ed's plan, promises Ed that instead of Ed giving money to Ben, Ralph will himself pay Ben \$500. Because Ralph is much more prosperous than Ed, and because Ralph is known throughout the community for his integrity, Ed relies upon his promise and donates to charity the \$500 that he has on hand. Ralph fails to pay any money to Ben, and Ben is understandably disappointed. Ben brings suit against Ralph on the theory of promissory estoppel, basing his claim for \$500 on reliance on the part of his uncle.

It is the writer's contention, assuming the existence of a \$500 debt owing from Ed to Ben, that Ben should be allowed to recover in his suit against Ralph. On the other hand, if there were no preexisting debt between Ed and Ben, Ben could advance fewer and less compelling reasons in favor of his recovery against Ralph. The purpose of this note is to examine the doctrine of promissory estoppel as it relates to third party beneficiary law. Specifically, an investigation and analysis will be made of the circumstances under which a third party beneficiary should be able to enforce a gratuitous promise when only the promisee, not the beneficiary himself, has relied upon the promisor's promise. An examination of third party beneficiary law will be made, followed by an examination of the proposed changes in promissory estoppel doctrine suggested by the Tentative Draft of the *Restatement (Second) of Contracts*.¹ The discussion of promissory estoppel doctrine will include an analysis of the distinction between reliance upon, and consideration given for, a promise. Finally, the two doctrines will be merged, and proposed solutions will be presented.

THIRD PARTY BENEFICIARY DOCTRINE

Third party beneficiary doctrine has been the subject of much

1. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965) [hereinafter referred to as *Restatement II*].

debate in the United States and England.² England has yet to recognize a contract that lacks privity between the promisor and the third party beneficiary as enforceable.³ Courts in the United States, however, have generally accepted the doctrine and will permit a beneficiary's suit against the promisor to succeed even though consideration has not moved from the beneficiary⁴ and there has been no privity of contract between the beneficiary and the promisor.⁵ According to *Restatement of Contracts*, the sole restriction upon the applicability of the doctrine in the United States is that the parties to the contract must have intended to benefit the beneficiary.⁶ For the purposes of this note, it is assumed that all beneficiaries mentioned herein are "intended," i.e., that the parties desired to confer an advantage upon the particular third person involved in each instance.⁷

The classification of a beneficiary as a "donee" or a "creditor" has been of some importance in the United States in the past. Primarily, the classification determined at what point in time the beneficiary's rights vested.⁸ A beneficiary, according to *Restatement I*, is

a donee beneficiary if it appears from the terms of the promise in view of the accompanying circumstances that the purpose of the promisee in obtaining the promise of all or part of the performance thereof is to make a gift to the beneficiary or to confer upon him a right against the promisor to some performance neither due nor supposed or asserted to be due from the promisee to the beneficiary.⁹

On the other hand, a beneficiary is

a creditor beneficiary if no purpose to make a gift appears from the terms of the promise in view of the accompanying circumstances and performance of the promise will satisfy an actual or supposed or asserted duty of the promisee to the beneficiary¹⁰

2. E.g., MacIntyre, *Third Party Rights in Canadian and English Law*, 2 U.B.C.L. REV. 103 (1965); Note, *Third Party Beneficiary Concept: A Proposal*, 57 COLUM. L. REV. 406 (1957).

3. *Beswick v. Beswick*, [1968] A.C. 52.

4. 4 A. CORBIN, CORBIN ON CONTRACTS § 778 (1951) [hereinafter cited as CORBIN].

5. *Id.* § 779.

6. RESTATEMENT OF CONTRACTS § 133 (1932) [hereinafter cited as RESTATEMENT I and referred to as *Restatement I*].

7. See 4 CORBIN §§ 776-77.

8. RESTATEMENT I §§ 142-43.

9. *Id.* § 133(1)(a).

10. *Id.* § 133(1)(b).

Thus, the distinction of whether the beneficiary is a donee or a creditor turns upon the existence of a duty from the promisee to the beneficiary.

In the United States, it was first held that only a creditor beneficiary had sufficient interest to sue on a contract made for his benefit between the promisor and the promisee. The court in *Vrooman v. Turner*¹¹ stated this succinctly when it noted:

A mere stranger cannot intervene, and claim by action the benefit of a contract between other parties. There must be either a new consideration or some prior right or claim against one of the contracting parties, by which he has a legal interest in the performance of the agreement.¹²

It is apparent that the court in *Vrooman* reluctantly granted the creditor beneficiary the right to sue the promisor and barred altogether the right of the donee beneficiary. Today, as noted above, the only restriction upon the right of a beneficiary to sue is that the beneficiary must show that he was intended to benefit.¹³ However, the distinction between a donee and a creditor should figure importantly in a court's consideration of whether, in a promissory estoppel situation, the beneficiary should be allowed to recover when only the promisee has relied upon the promisor's promise.¹⁴

In the years following the *Vrooman* case, courts gradually began to recognize the right of the donee beneficiary directly to sue the promisor.¹⁵ In 1932, *Restatement I* not only gave recognition to the donee beneficiary's right of action against the promisor, but also gave the donee beneficiary a preferred status, making the promisee and promisor unable to vary or discharge the contractual duty owed the donee.¹⁶ On the other hand, the creditor beneficiary's rights were subject to variation by the parties to the contract up to the time the creditor relied upon the contract.¹⁷ One possible reason for the donee's preferred status is that the donee has no recourse against the promisee after the promisee releases the promisor. Conversely, if a duty is owed by the promisee to the beneficiary, release of the promisor by the promisee will not greatly prejudice the beneficiary because the creditor beneficiary still

11. 69 N.Y. 280, 25 Am. Rep. 195 (1877).

12. *Id.* at 282, 25 Am. Rep. at 197-98.

13. See note 5 *supra* and accompanying text.

14. See notes 35-54 *infra* and accompanying text.

15. *E.g.*, *Riepe v. Schmidt*, 199 Ill. App. 129 (1916); *Sedgwick v. Blanchard*, 164 Wis. 421, 160 N.W. 267 (1916).

16. RESTATEMENT I § 142.

17. *Id.* § 143.

has his (perhaps premature) cause of action against the promisee.¹⁸ This reason seems unconvincing, and various authors have assailed the position of *Restatement I*.¹⁹

As a result of this criticism,²⁰ *Restatement II* declares that the rights of an intended beneficiary may be varied or discharged by the promisee so long as the beneficiary has not relied upon the contract between the promisor and promisee.²¹ Thus, under the proposed *Restatement II*, the parties to the contract may freely vary its terms whether the intended beneficiary be, under the definitions used herein, a creditor or a donee.

In summary, it would seem that courts in the United States have liberalized beneficiary law over the last century, and the proposed *Restatement II* has carried this trend further by suggesting the abolition of the distinction between creditor and donee beneficiaries.

II PROMISSORY ESTOPPEL AND THIRD PARTY BENEFICIARIES

Promissory estoppel is normally applied to two-party situations. The doctrine allows the enforcement of a promise even though there has been no consideration given for that promise.²² The doctrine is based upon the premise that reliance upon a gratuitous promise should, in some instances, be the basis for enforcement of the promise, although an "estoppel" in the true sense of the word is not involved.²³ Section 90 of *Restatement I* provides that:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.²⁴

Although reliance has been used to enforce gratuitous promises, it cannot be said that reliance and consideration are synonymous.²⁵ In spite of this, courts, when confronted with the promisee's reliance, have tended to enforce the whole of the promise, *i.e.*, have tended to protect the expectation interest. This was pointed out in a series of articles by

18. See 4 CORBIN § 815.

19. *E.g.*, Page, *The Power of the Contracting Parties to Alter a Contract for Rendering a Performance to a Third Person*, 12 WIS. L. REV. 141 (1937).

20. 44 A.L.I. PROCEEDINGS 323 (1967).

21. RESTATEMENT (SECOND) OF CONTRACTS § 142 (Tent. Draft No. 3, 1967).

22. RESTATEMENT I § 90.

23. *Colbath v. H. B. Stebbins Lumber Co.*, 127 Me. 406, 144 A. 1 (1929).

24. RESTATEMENT I § 90.

25. See notes 25-29 *infra* and accompanying text.

Lon Fuller and William Perdue.²⁶ They contend that in cases involving reliance upon gratuitous promises falling under section 90 of *Restatement I*, there is less reason to protect the expectation interest than in cases in which consideration has been given for the promise. The basis for this contention is well expressed when they state:

Where we are dealing with exchanges or bargains it is easy to discern this utility [of protecting the expectation interest] since such transactions form the very mechanism by which production is organized in a capitalistic society. There seems no basis for assuming any such general utility in the promises coming under section 90, since they are restricted only by a negative definition—they are not bargains.²⁷

The authors do not contend that in all cases of reliance upon a gratuitous promise the measure of damages should be restricted to the reliance interest. Rather, they suggest that courts examine the various aspects of the particular case, *e.g.*, the certainty of reliance damages as opposed to the certainty of damages by enforcing the whole promise, the element of good faith or bad faith on the part of the promisor and the degree or amount of the reliance itself. Once these factors are taken into consideration, the relief should be tailored accordingly. Thus, courts are urged to use discretion in awarding damages under section 90 of *Restatement I*. Fuller and Perdue's argument is summed up when they state that

we cannot solve the problem of reimbursing reliance simply by converting the relied upon promise into a "contract" like every other contract. The need for compensating reliance must be treated as a distinct promissory interest, deserving recognition on its own account.²⁸

Section 90 of proposed *Restatement II* incorporates the recommendation of Fuller and Perdue when it states that "[t]he remedy granted for breach may be limited as justice requires."²⁹ The suggestion

26. Fuller & Perdue, *The Reliance Interest in Contract Damages* (pts. 1-2), 46 YALE L.J. 52, 373 (1936-1937).

27. *Id.* at 65.

28. *Id.* at 420.

29. A promise which the promisor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise. The remedy granted for breach may be limited as justice requires.

RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

contained therein is that reliance upon a promise is not equal to consideration given for a promise, and, therefore, that partial enforcement can be a sufficient measure of damages in gratuitous promise cases.³⁰

When promissory estoppel concepts are considered in conjunction with third party beneficiary law, the question becomes: Does the beneficiary have the right to invoke his own reliance to enforce a gratuitous promise made for his benefit. In this situation, there has been no contract created between the promisor and the promisee and, thus, the beneficiary's rights are more questionable than in cases where consideration has passed from the promisee to the promisor. Section 90 of *Restatement I*, by providing for enforcement of a gratuitous promise relied upon by the promisee only, implicitly excludes enforcement of a gratuitous promise which was relied upon by a third party.

Whether the beneficiary who relied upon the promisor's gratuitous promise should be allowed to recover from the promisor became the subject of debate. Professor Boyer considered the question and took a stand against the extension of promissory estoppel to beneficiaries:

To hold a promisor because third parties have or may have changed position in reliance upon his [promisor's] promise runs counter to the general trend of promissory obligations. The Restatement expressly limits the doctrine to action or forbearance on the part of the promisee. The limitation is a sound one for it tends to keep promissory estoppel within justifiable limits.³¹

Professor Corbin, on the other hand, supported the extension of promissory estoppel to embrace beneficiaries so long as the beneficiaries themselves had relied upon the promise. In his treatise, Corbin stated:

But if a promise is made by A to B for the benefit of C, it will often be action by C that A has reason to foresee; and it seems reasonably clear that action or forbearance by a named or intended beneficiary of the promise should be included in the stated rule. . . . If the promisor actually foresees, or has reason to foresee, such action [in reliance] by a third person, it may be quite unjust to refuse to perform the promise.³²

Proposed *Restatement II* accepts Corbin's contention and gives to a

30. See note 43 *infra* and accompanying text.

31. Boyer, *Promissory Estoppel: Requirements and Limitations of the Doctrine*, 98 U. PA. L. REV. 459, 465 (1950) (footnote omitted).

32. 1A CORBIN § 200 (footnote omitted).

beneficiary who relies upon the promisor's promise the right to invoke its section 90 against the promisor—subject, of course, to the qualifications of foreseeable, definite and substantial reliance.³³

Although it is now fairly well settled that a third party beneficiary who reasonably relies upon the promisor's gratuitous promise may enforce that promise, it is not clear whether the beneficiary may base his claim upon the promisee's reliance. Keeping in mind the distinction between donee and creditor beneficiaries previously noted,³⁴ and that reliance upon a gratuitous promise is not consideration per se,³⁵ the implications of these premises will be considered in arriving at a proposed solution in the following section.

SHOULD A BENEFICIARY BE ALLOWED TO INVOKE THE PROMISEE'S RELIANCE TO ENFORCE THE PROMISOR'S GRATUITOUS PROMISE?

Whether a beneficiary may use the promisee's reliance upon the promisor's gratuitous promise to enforce that promise has seldom expressly arisen in the field of contracts. One reason for its scarcity is that prior to *Restatement II* the doctrine of promissory estoppel was implicitly limited to two-party situations in which only the promisee could enforce the promise.³⁶ Another reason is that such fact situations seldom arise.

The reader's attention is directed to the hypothetical fact situation stated at the beginning of this note. In that situation, Ralph promised Ed that he (Ralph) would pay money to Ben. Ed relied upon this gratuitous promise. Ralph failed to give the money to Ben, and Ben, feeling disappointed but not having himself relied upon the promise, attempts to enforce the promise by invoking Ed's reliance. Should Ben's suit succeed?

One who has considered this question suggests that the reasonable, substantial and foreseeable reliance³⁷ by the promisee on a gratuitous promise meant to benefit a third party should provide that third party with a basis for enforcing the promise.³⁸

33. One unanswered problem raised by section 90 of proposed *Restatement II* is the relationship between the use of reliance by the beneficiary and the traditional requirement in beneficiary law that the beneficiary's rights be subject to the defenses of the promisor, e.g., failure of consideration. Implicit in section 90 of proposed *Restatement II* is the contention that the reliance of the beneficiary overcomes the lack of consideration, and it is on this basis that the promise is enforced.

34. See notes 6-7 *supra* and accompanying text.

35. See notes 23-24 *supra* and accompanying text.

36. See notes 30-32 *supra* and accompanying text.

37. See *RESTATEMENT I* § 90.

38. Note, *The Requirements of Promissory Estoppel As Applied to Third Party Beneficiaries*, 30 U. PITT. L. REV. 174 (1968).

It is submitted that, once the validation device is effectively used, be it consideration or promissory estoppel, the *contract* should be enforceable by a third party. The *contract* having been made for his benefit, suit by him directly should be permitted.³⁹

Although this suggestion is attractive, it encounters a number of serious obstacles. First, in a gratuitous promise situation, a contract has never been created—there has been no *quid pro quo* and no element of bargain. Therefore, to speak of enforcement of a contract is inappropriate. As has been discussed above, reliance is not of itself consideration.⁴⁰ Second, the suggestion apparently overlooks the use of partial enforcement to avoid injustice, as advanced by Corbin⁴¹ and the proposed *Restatement II*.⁴² Third, that writer's suggestion does not take into account the presence or absence of a preexisting duty owed by the promisee to the beneficiary. It is submitted that the presence or absence of a duty should be given considerable weight in a court's consideration.

The proposed *Restatement II* abandons the distinction between creditor and donee beneficiaries.⁴³ As noted above, however, the existence of a duty owed from the promisee to the beneficiary should have a substantial effect on the outcome of litigation when a beneficiary bases his claim on the promisee's reliance. Therefore, this note will continue to employ the terms "creditor beneficiary" and "donee beneficiary."

Creditor Beneficiaries

In creditor beneficiary cases, it is asserted that the beneficiary can show compelling reasons for enforcement of at least part of the promise.⁴⁴ In the hypothetical which began this note, Ralph promised Ed that Ralph would pay Ben \$500. Ed relied upon the promise, and Ben

39. *Id.* at 179 (emphasis added).

40. See notes 24-27 *supra* and accompanying text.

41. 1A CORBIN § 205.

42. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

43. "Intended beneficiar[ies]" are substituted in place of creditor and donee beneficiaries. *Id.*

44. The measure of damages in each instance depends upon the facts in the particular case, with special emphasis to be placed upon the presence or absence of fraud, misrepresentation or bad faith. However, as a general rule for creditor beneficiary cases falling under section 90, courts should consider the amount of harm caused to the promisee by his reliance upon the promise. This would more adequately tailor the relief to fit the situation, rather than the previously discussed custom in courts to enforce the whole promise. Such a rule of recovery would lead to at least partial discharge, as when the amount of reliance is less than the preexisting duty owed by the promisee to the beneficiary. In such a case, the promisee debtor would remain liable for the amount of the preexisting duty owed the beneficiary which is not compensated by damages from the promisor.

attempted to enforce the promise by using Ed's reliance. If we assume that Ed owed Ben \$500, there are several reasons why a court should seriously consider enforcing the gratuitous promise.

1) The promisee Ed, who owes a duty to the beneficiary Ben, has relied upon the promise in a reasonable expectation that his duty to the beneficiary will be discharged by performance of promisor Ralph's promise. If the promise is not enforced, Ed will be burdened with the preexisting duty to Ben in addition to his own reasonable reliance upon Ralph's promise—in this case, donation of \$500 to charity. In effect, Ed will be penalized \$500 for his reliance if Ben is not allowed to recover from Ralph.

2) The enforcement of the promise will not give the beneficiary a windfall, but rather only that which is due him from the promisor. Enforcement, of course, means that Ralph will assume Ed's obligation to Ben.⁴⁵

3) The enforcement of the promise by Ben will prevent circuity of action. Certainly Ben still has his cause of action against debtor Ed, and Ed, because of his reasonable reliance, might well have a cause of action against Ralph under section 90. If Ben is allowed to sue Ralph directly, wasteful litigation or necessary joinder of parties⁴⁶ could be avoided.

4) The promisor Ralph will not be unduly burdened or penalized, since the reliance of Ed was reasonable, definite and foreseeable as required by section 90.

In essence, then, it can be argued that the creditor beneficiary in a promissory estoppel case in which only the promisee has relied upon the promisor's gratuitous promise can show himself to be a deserving plaintiff. Moreover, by enforcement of the promise, the promisee's interests can be adequately and expeditiously protected.

Donee Beneficiaries

The creditor beneficiary situation should be compared to that of the donee beneficiary. In the same case involving a promise by Ralph to Ed for the benefit of Ben, we may now assume that there is no preexisting duty owed by Ed to Ben. Therefore, Ben is a donee beneficiary.⁴⁷ It is

45. Note that the creditor beneficiary can be said to be the recipient of a "windfall" in that he gains another obligor because of the promisee's reliance upon the promisor's gratuitous promise. However, the creditor beneficiary ultimately will receive only what is due to him. As developed in the following sections of this note, the donee beneficiary, if indeed the promise is enforced, is truly the recipient of a windfall; he would receive performance which is purely a gift.

46. FED. R. CIV. P. 19(a).

47. RESTATEMENT I § 133(1)(a).

submitted that less compelling reasons can be raised to favor the enforcement of the promise by Ben. Further, it is asserted that even partial enforcement of the promise by the donee will not usually be necessary to avoid injustice.⁴⁸ This suggestion holds true even though Ed's reliance be quite definite, substantial and foreseeable. Some reasons for this conclusion follow.

1) The donee beneficiary can show no personal harm; he has neither relied upon the promise nor changed his position. The reasons that he should be allowed to enforce the promise in his own right are lacking since, by definition, the donee is owed nothing by the promisee.

2) If the donee beneficiary were allowed to enforce the promise, such would constitute a windfall to him; he would be receiving a gift benefit for which there had been no bargain. The donee, not having himself relied upon the promise and being owed nothing by either party, can show no reason why the promisor should be compelled to pay him anything.

3) The promisee's position in relation to the beneficiary has not changed since the promisee owed nothing to the donee, and, therefore, the promisee will not be liable in any way for the donee's possible disappointment. This is to be contrasted to the creditor beneficiary situation⁴⁹ in which the promisee would still owe an obligation to the beneficiary if the promise were not enforced. The absence of a duty owed by the promisee to the beneficiary means that the promisee's legal relations with the beneficiary cannot be adversely affected by the court's failure to enforce the promise.

Application of Principle—Examples

An interesting case that presents a donee beneficiary situation where only the promisee relied upon a gratuitous promise is *Overlock v. Central Vermont Public Service Corp.*⁵⁰ In this case, the promisor was the employer of the beneficiary. The beneficiary had been injured while in the promisor's employ, and the promisees began voluntarily to take up a public collection for the beneficiary. The fund collectors owed no duty whatsoever to the injured beneficiary, but acted solely from altruistic feelings. The promisor-employer then assured the fund collectors that the beneficiary would be supported for the rest of his life by the employer, and as a result of this assurance or promise, the fund collectors ceased their efforts. The employer later failed to support the beneficiary, and

48. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

49. See notes 43-45 *supra* and accompanying text.

50. 126 Vt. 549, 237 A.2d 356 (1967).

the beneficiary brought suit against the employer for the amount of money that would have been realized by the collection had not the employer intervened. The court held that since insufficient reliance was shown, the beneficiary could not recover.⁵¹

It is suggested that the court's decision was correct, but that the reasons advanced seem inadequate. The beneficiary can show no personal reliance and, therefore, can show no personal harm. At worst he is disappointed. However, we might assume that the fund collectors could show substantial reliance. Nevertheless, the employee should not be allowed to enforce this promise because he can show no reason why either party should confer a gift upon him. The assumed reliance by the fund collectors does not leave them with an unfulfilled legal—or even moral—obligation to the employee. If, on the other hand, a duty were owed by the promisee to the beneficiary, a different result might justifiably obtain.⁵² But in the donee situation, enforcement of the promise is simply not necessary to avoid injustice.⁵³

Another instance can be found in which a donee beneficiary attempts to use the promisee's reliance to enforce the promisor's gratuitous promise. Assume that a promisor promises the promisee that he will transfer land to the beneficiary. In reliance upon this promise, the promisee builds a dwelling on the land for the beneficiary's future use. Later, the promisor fails to transfer title to the land, and the beneficiary sues to force conveyance.⁵⁴

51. *Overlock* has been interpreted as a possible unilateral contract case in which the forbearance of the fund collectors to continue collecting the funds was the consideration for the promise. 1A CORBIN § 200 (1951, Supp. 1971). If a unilateral contract had been contemplated and formed by the parties, the plaintiff-beneficiary rightfully could have sued to enforce the whole promise—the assurance that the beneficiary would be taken care of for his life by the employer. However, the beneficiary did not sue for the total promise, but only for the lost proceeds of the collection. It thus seems that a unilateral contract was clearly contrary to the intention of the employer in making his promise. Instead, the case appears to involve a purely gratuitous promise.

52. If a preexisting duty had been owed by the fund collectors to the employee, e.g., the fund collectors were themselves charged with the employee's support, then under the reasoning of this note a different result should have obtained. In such an instance, the creditor beneficiary would have been entitled to at least partial enforcement of the promise. See note 43 *supra* and accompanying text.

53. See RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Draft No. 2, 1965).

54. In *Horsefield v. Gedicks*, 94 N.J. Eq. 82, 118 A. 275 (1922), the court ordered conveyance. In that case, Uncle and Aunt promised to give land to the donee beneficiary, and Aunt constructed a house on the land that had been promised to the donee. The promise to give the land to the donee was wholly gratuitous. Aunt passed away and Uncle subsequently remarried. The second spouse of Uncle brought suit in ejectment, and the donee answered that there had been an oral gift of land to the donee. The court ordered specific performance of the promise, basing its opinion on the fact that Aunt had made a completed gift of the house to the donee, and that the donee should be permitted to receive full value of the gift.

Because the beneficiary in this situation is a donee rather than a creditor,⁵⁵ it is submitted that the court has little reason to enforce the promise. It seems that the beneficiary's interest does not warrant protection, for the beneficiary himself will not be adversely affected by failure to enforce the promise.⁵⁶ The only party who has been harmed by the reliance upon the gratuitous promise is the promisee himself, and, therefore, the promisee's right to recover should be paramount to any interest of the beneficiary. If the promisee were to bring an action, a just settlement might be based upon the value of the improvements made upon the land without requiring the promisor to convey away the land. In summary, only the interest of the promisee deserves protection in this instance, and the amount of damages that should be awarded to the promisee would equitably be measured by the reliance interest itself.

CONCLUSION

It is the writer's contention that in cases of reliance upon a gratuitous promise by the promisee in a third party beneficiary situation, the beneficiary who is a creditor of the promisee can marshal more compelling reasons in favor of his recovery than can the beneficiary who is merely a donee of the promisee. Of course, considerations other than those implicit in the classification of the beneficiary as donee or creditor must play important roles in a court's determination of the suit, *e.g.*, the extent of reliance, the foreseeability of reliance and the relationships among the parties. Nevertheless, to arrive at an equitable result, the court should give consideration to the presence or absence of a preexisting duty owed by the promisee to the beneficiary.

55. RESTATEMENT I § 133.

56. If a duty were owed by the promisee to the beneficiary, rather than the present donee instance, the beneficiary would have a more persuasive argument for his recovery. See notes 43-45 *supra* and accompanying text.