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[BOOK 2]

Ⅴ. Contract

Restatement (Second) of Contract

Uniform commercial Code, Article 2 Sales

James Baird v. Gimbel Bros.

Drennan v. Star Paving Co.

Air Products v. Fairbanks Morse

Hamer v. Sidway

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Feinberg v. Pfeiffer Co.

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Mitchill v. Lath

Williams v. Walker-Thomas Furniture Co.

Taylor v. Caldwell; Transatlantic Financing Corporation v. United States (from Farnsworth, Young & Sanger, Cases and Materials on Contracts, 6th ed.)

Krell v. Henry

Hadley v. Baxendale (from Kessler, Gilmore & Kronman, Contracts, 3rd ed.)

Sullivan v. O'Connor

Sedmak v. Charlie's Chevrolet, Inc.

Betaco v. Cessna

Restatement (Second) of Contracts

Chapter 1. Meaning Of Terms

§ 1. Contract Defined

A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

§ 2. Promise; Promisor; Promisee; Beneficiary

(1) A promise is a manifestation of intention to act or refrain from acting in a specified way, so made as to justify a promisee in understanding that a commitment has been made.
(2) The person manifesting the intention is the promisor.
(3) The person to whom the manifestation is addressed is the promisee.
(4) Where performance will benefit a person other than the promisee, that person is a beneficiary.

§ 3. Agreement Defined; Bargain Defined

An agreement is a manifestation of mutual assent on the part of two or more persons. A bargain is an agreement to exchange promises or to exchange a promise for a performance or to exchange performances.

§ 4. How A Promise May Be Made

A promise may be stated in words either oral or written, or may be inferred wholly or partly from conduct.

§ 5. Terms Of Promise, Agreement, Or Contract

(1) A term of a promise or agreement is that portion of the intention or assent manifested which relates to a particular matter.
(2) A term of a contract is that portion of the legal relations resulting from the promise or set of promises which relates to a particular matter, whether or not the parties manifest an intention to create those relations.

§ 6. Formal Contracts

The following types of contracts are subject in some respects to special rules that depend on their formal characteristics and differ from those governing contracts in general:
(a) Contracts under seal,
(b) Recognizances,
(c) Negotiable instruments and documents,
(d) Letters of credit.

§ 7. Voidable Contracts

A voidable contract is one where one or more parties have the power, by a manifestation of election to do so, to avoid the legal relations created by the contract, or by ratification of the contract to extinguish the power of avoidance.

§ 8. Unenforceable Contracts

An unenforceable contract is one for the breach of which neither the remedy of damages nor the remedy of specific performance is available, but which is recognized in some other way as creating a duty of performance, though there has been no ratification.

Chapter 2. Formation Of Contracts--Parties And Capacity

§ 9. Parties Required

There must be at least two parties to a contract, a promisor and a promisee, but there may be any greater number.

§ 10. Multiple Promisors And Promisees Of The Same Performance

(1) Where there are more promisors than one in a contract, some or all of them may promise the same performance, whether or not there are also promises of separate performances.
(2) Where there are more promisees than one in a contract, a promise may be made to some or all of them as a unit, whether or not the same or another performance is separately promised to one or more of them.

§ 11. When A Person May Be Both Promisor And Promisee

A contract may be formed between two or more persons acting as a unit and one or more but fewer than all of these persons, acting either singly or with other persons.

§ 12. Capacity To Contract

(1) No one can be bound by contract who has not legal capacity to incur at least voidable contractual duties. Capacity to contract may be partial and its existence in respect of a particular transaction may depend upon the nature of the transaction or upon other circumstances.
(2) A natural person who manifests assent to a transaction has full legal capacity to incur contractual duties thereby unless he is
(a) under guardianship, or
(b) an infant, or
(c) mentally ill or defective, or
(d) intoxicated.

§ 13. Persons Affected By Guardianship

A person has no capacity to incur contractual duties if his property is under guardianship by reason of an adjudication of mental illness or defect.

§ 14. Infants

Unless a statute provides otherwise, a natural person has the capacity to incur only voidable contractual duties until the beginning of the day before the person's eighteenth birthday.

§ 15. Mental Illness Or Defect

(1) A person incurs only voidable contractual duties by entering into a transaction if by reason of mental illness or defect

(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
(b) he is unable to act in a reasonable manner in relation to the transaction and the other party has reason to know of his condition.
(2) Where the contract is made on fair terms and the other party is without knowledge of the mental illness or defect, the power of avoidance under Subsection (1) terminates to the extent that the contract has been so performed in whole or in part or the circumstances have so changed that avoidance would be unjust. In such a case a court may grant relief as justice requires.

§ 16. Intoxicated Persons

A person incurs only voidable contractual duties by entering into a transaction if the other party has reason to know that by reason of intoxication
(a) he is unable to understand in a reasonable manner the nature and consequences of the transaction, or
(b) he is unable to act in a reasonable manner in relation to the transaction.

Chapter 3. Formation Of Contracts--Mutual Assent

Topic 1. In General

§ 17. Requirement Of A Bargain

(1) Except as stated in Subsection (2), the formation of a contract requires a bargain in which there is a manifestation of mutual assent to the exchange and a consideration.
(2) Whether or not there is a bargain a contract may be formed under special rules applicable to formal contracts or under the rules stated in §§ 82-94.

Topic 2. Manifestation Of Assent In General

§ 18. Manifestation Of Mutual Assent

Manifestation of mutual assent to an exchange requires that each party either make a promise or begin or render a performance.

§ 19. Conduct As Manifestation Of Assent

(1) The manifestation of assent may be made wholly or partly by written or spoken words or by other acts or by failure to act.
(2) The conduct of a party is not effective as a manifestation of his assent unless he intends to engage in the conduct and knows or has reason to know that the other party may infer from his conduct that he assents.
(3) The conduct of a party may manifest assent even though he does not in fact assent. In such cases a resulting contract may be voidable because of fraud, duress, mistake, or other invalidating cause.

§ 20. Effect Of Misunderstanding

(1) There is no manifestation of mutual assent to an exchange if the parties attach materially different meanings to their manifestations and
(a) neither party knows or has reason to know the meaning attached by the other; or

(b) each party knows or each party has reason to know the meaning attached by the other.
(2) The manifestations of the parties are operative in accordance with the meaning attached to them by one of the parties if
(a) that party does not know of any different meaning attached by the other, and the other knows the meaning attached by the first party; or
(b) that party has no reason to know of any different meaning attached by the other, and the other has reason to know the meaning attached by the first party.

Topic 3. Making Of Offers

§ 24. Offer Defined

An offer is the manifestation of willingness to enter into a bargain, so made as to justify another person in understanding that his assent to that bargain is invited and will conclude it.

§ 25. Option Contracts

An option contract is a promise which meets the requirements for the formation of a contract and limits the promisor's power to revoke an offer.

§ 26. Preliminary Negotiations

A manifestation of willingness to enter into a bargain is not an offer if the person to whom it is addressed knows or has reason to know that the person making it does not intend to conclude a bargain until he has made a further manifestation of assent.

§ 27. Existence Of Contract Where Written Memorial Is Contemplated

Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agreements are preliminary negotiations.

§ 30. Form Of Acceptance Invited

(1) An offer may invite or require acceptance to be made by an affirmative answer in words, or by performing or refraining from performing a specified act, or may empower the offeree to make a selection of terms in his acceptance.
(2) Unless otherwise indicated by the language or the circumstances, an offer invites acceptance in any manner and by any medium reasonable in the circumstances.

§ 32. Invitation Of Promise Or Performance

In case of doubt an offer is interpreted as inviting the offeree to accept either by promising to perform what the offer requests or by rendering the performance, as the offeree chooses.

§ 33. Certainty

(1) Even though a manifestation of intention is intended to be understood as an offer, it cannot be accepted so as to form a contract unless the terms of the contract are reasonably certain.
(2) The terms of a contract are reasonably certain if they provide a basis for determining the

existence of a breach and for giving an appropriate remedy.
(3) The fact that one or more terms of a proposed bargain are left open or uncertain may show that a manifestation of intention is not intended to be understood as an offer or as an acceptance.

§ 34. Certainty And Choice Of Terms; Effect Of Performance Or Reliance

(1) The terms of a contract may be reasonably certain even though it empowers one or both parties to make a selection of terms in the course of performance.
(2) Part performance under an agreement may remove uncertainty and establish that a contract enforceable as a bargain has been formed.
(3) Action in reliance on an agreement may make a contractual remedy appropriate even though uncertainty is not removed.

Topic 4. Duration Of The Offeree's Power Of Acceptance

§ 35. The Offeree's Power Of Acceptance

(1) An offer gives to the offeree a continuing power to complete the manifestation of mutual assent by acceptance of the offer.
(2) A contract cannot be created by acceptance of an offer after the power of acceptance has been terminated in one of the ways listed in § 36.

§ 36. Methods Of Termination Of The Power Of Acceptance

(1) An offeree's power of acceptance may be terminated by
(a) rejection or counter-offer by the offeree, or
(b) lapse of time, or
(c) revocation by the offeror, or
(d) death or incapacity of the offeror or offeree.
(2) In addition, an offeree's power of acceptance is terminated by the non- occurrence of any condition of acceptance under the terms of the offer.

§ 37. Termination Of Power Of Acceptance Under Option Contract

Notwithstanding §§ 38-49, the power of acceptance under an option contract is not terminated by rejection or counter-offer, by revocation, or by death or incapacity of the offeror, unless the requirements are met for the discharge of a contractual duty.

§ 38. Rejection

(1) An offeree's power of acceptance is terminated by his rejection of the offer, unless the offeror has manifested a contrary intention.
(2) A manifestation of intention not to accept an offer is a rejection unless the offeree manifests an intention to take it under further advisement.

§ 39. Counter-Offers

(1) A counter-offer is an offer made by an offeree to his offeror relating to the same matter as the original offer and proposing a substituted bargain differing from that proposed by the original offer.

(2) An offeree's power of acceptance is terminated by his making of a counter-offer, unless the offeror has manifested a contrary intention or unless the counter-offer manifests a contrary intention of the offeree.

§ 40. Time When Rejection Or Counter-Offer Terminates The Power Of Acceptance

Rejection or counter-offer by mail or telegram does not terminate the power of acceptance until received by the offeror, but limits the power so that a letter or telegram of acceptance started after the sending of an otherwise effective rejection or counter-offer is only a counter-offer unless the acceptance is received by the offeror before he receives the rejection or counter-offer.

§ 41. Lapse Of Time

(1) An offeree's power of acceptance is terminated at the time specified in the offer, or, if no time is specified, at the end of a reasonable time.

(2) What is a reasonable time is a question of fact, depending on all the circumstances existing when the offer and attempted acceptance are made.

(3) Unless otherwise indicated by the language or the circumstances, and subject to the rule stated in § 49, an offer sent by mail is seasonably accepted if an acceptance is mailed at any time before midnight on the day on which the offer is received.

§ 42. Revocation By Communication From Offeror Received By Offeree

An offeree's power of acceptance is terminated when the offeree receives from the offeror a manifestation of an intention not to enter into the proposed contract.

§ 43. Indirect Communication Of Revocation

An offeree's power of acceptance is terminated when the offeror takes definite action inconsistent with an intention to enter into the proposed contract and the offeree acquires reliable information to that effect.

§ 45. Option Contract Created By Part Performance Or Tender

(1) Where an offer invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it.

(2) The offeror's duty of performance under any option contract so created is conditional on completion or tender of the invited performance in accordance with the terms of the offer.

§ 46. Revocation Of General Offer

Where an offer is made by advertisement in a newspaper or other general notification to the public or to a number of persons whose identity is unknown to the offeror, the offeree's power of acceptance is terminated when a notice of termination is given publicity by advertisement or other general notification equal to that given to the offer and no better means of notification is reasonably available.

§ 48. Death Or Incapacity Of Offeror Or Offeree

An offeree's power of acceptance is terminated when the offeree or offeror dies or is deprived of legal capacity to enter into the proposed contract.

Topic 5. Acceptance Of Offers

§ 50. Acceptance Of Offer Defined; Acceptance By Performance; Acceptance By Promise

(1) Acceptance of an offer is a manifestation of assent to the terms thereof made by the offeree in a manner invited or required by the offer.

(2) Acceptance by performance requires that at least part of what the offer requests be performed or tendered and includes acceptance by a performance which operates as a return promise.

(3) Acceptance by a promise requires that the offeree complete every act essential to the making of the promise.

§ 51. Effect Of Part Performance Without Knowledge Of Offer

Unless the offeror manifests a contrary intention, an offeree who learns of an offer after he has rendered part of the performance requested by the offer may accept by completing the requested performance.

§ 52. Who May Accept An Offer

An offer can be accepted only by a person whom it invites to furnish the consideration.

§ 53. Acceptance By Performance; Manifestation Of Intention Not To Accept

(1) An offer can be accepted by the rendering of a performance only if the offer invites such an acceptance.

(2) Except as stated in § 69, the rendering of a performance does not constitute an acceptance if within a reasonable time the offeree exercises reasonable diligence to notify the offeror of non-acceptance.

(3) Where an offer of a promise invites acceptance by performance and does not invite a promissory acceptance, the rendering of the invited performance does not constitute an acceptance if before the offeror performs his promise the offeree manifests an intention not to accept.

§ 54. Acceptance By Performance; Necessity Of Notification To Offeror

(1) Where an offer invites an offeree to accept by rendering a performance, no notification is necessary to make such an acceptance effective unless the offer requests such a notification.

(2) If an offeree who accepts by rendering a performance has reason to know that the offeror has no adequate means of learning of the performance with reasonable promptness and certainty, the contractual duty of the offeror is discharged unless

(a) the offeree exercises reasonable diligence to notify the offeror of acceptance, or

(b) the offeror learns of the performance within a reasonable time, or

(c) the offer indicates that notification of acceptance is not required.

§ 55. Acceptance Of Non-Promissory Offers

Acceptance by promise may create a contract in which the offeror's performance is completed when the offeree's promise is made.

§ 56. Acceptance By Promise; Necessity Of Notification To Offeror

Except as stated in § 69 or where the offer manifests a contrary intention, it is essential to an acceptance by promise either that the offeree exercise reasonable diligence to notify the offeror of acceptance or that the offeror receive the acceptance seasonably.

§ 58. Necessity Of Acceptance Complying With Terms Of Offer

An acceptance must comply with the requirements of the offer as to the promise to be made or the performance to be rendered.

§ 59. Purported Acceptance Which Adds Qualifications

A reply to an offer which purports to accept it but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer.

§ 60. Acceptance Of Offer Which States Place, Time Or Manner Of Acceptance

If an offer prescribes the place, time or manner of acceptance its terms in this respect must be complied with in order to create a contract. If an offer merely suggests a permitted place, time or manner of acceptance, another method of acceptance is not precluded.

§ 61. Acceptance Which Requests Change Of Terms

An acceptance which requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on an assent to the changed or added terms.

§ 62. Effect Of Performance By Offeree Where Offer Invites Either Performance Or Promise

(1) Where an offer invites an offeree to choose between acceptance by promise and acceptance by performance, the tender or beginning of the invited performance or a tender of a beginning of it is an acceptance by performance.

(2) Such an acceptance operates as a promise to render complete performance.

§ 63. Time When Acceptance Takes Effect

Unless the offer provides otherwise,

(a) an acceptance made in a manner and by a medium invited by an offer is operative and completes the manifestation of mutual assent as soon as put out of the offeree's possession, without regard to whether it ever reaches the offeror; but

(b) an acceptance under an option contract is not operative until received by the offeror.

§ 69. Acceptance By Silence Or Exercise Of Dominion

(1) Where an offeree fails to reply to an offer, his silence and inaction operate as an acceptance in the following cases only:

(a) Where an offeree takes the benefit of offered services with reasonable opportunity to

reject them and reason to know that they were offered with the expectation of compensation.
(b) Where the offeror has stated or given the offeree reason to understand that assent may be manifested by silence or inaction, and the offeree in remaining silent and inactive intends to accept the offer.
(c) Where because of previous dealings or otherwise, it is reasonable that the offeree should notify the offeror if he does not intend to accept.
(2) An offeree who does any act inconsistent with the offeror's ownership of offered property is bound in accordance with the offered terms unless they are manifestly unreasonable. But if the act is wrongful as against the offeror it is an acceptance only if ratified by him.

Chapter 4. Formation Of Contracts--Consideration

Topic 1. The Requirement Of Consideration

§ 71. Requirement Of Exchange; Types Of Exchange

(1) To constitute consideration, a performance or a return promise must be bargained for.
(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.
(3) The performance may consist of
(a) an act other than a promise, or
(b) a forbearance, or
(c) the creation, modification, or destruction of a legal relation.
(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.

§ 72. Exchange Of Promise For Performance

Except as stated in §§ 73 and 74, any performance which is bargained for is consideration.

§ 73. Performance Of Legal Duty

Performance of a legal duty owed to a promisor which is neither doubtful nor the subject of honest dispute is not consideration; but a similar performance is consideration if it differs from what was required by the duty in a way which reflects more than a pretense of bargain.

§ 74. Settlement Of Claims

(1) Forbearance to assert or the surrender of a claim or defense which proves to be invalid is not consideration unless
(a) the claim or defense is in fact doubtful because of uncertainty as to the facts or the law, or
(b) the forbearing or surrendering party believes that the claim or defense may be fairly determined to be valid.
(2) The execution of a written instrument surrendering a claim or defense by one who is under no duty to execute it is consideration if the execution of the written instrument is bargained for even though he is not asserting the claim or defense and believes that no valid claim or defense exists.

§ 77. Illusory And Alternative Promises

A promise or apparent promise is not consideration if by its terms the promisor or purported

promisor reserves a choice of alternative performances unless
(a) each of the alternative performances would have been consideration if it alone had been bargained for; or
(b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

§ 79. Adequacy Of Consideration; Mutuality Of Obligation

If the requirement of consideration is met, there is no additional requirement of
(a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or
(b) equivalence in the values exchanged; or
(c) "mutuality of obligation."

§ 81. Consideration As Motive Or Inducing Cause

(1) The fact that what is bargained for does not of itself induce the making of a promise does not prevent it from being consideration for the promise.
(2) The fact that a promise does not of itself induce a performance or return promise does not prevent the performance or return promise from being consideration for the promise.

Topic 2. Contracts Without Consideration

§ 82. Promise To Pay Indebtedness; Effect On The Statute Of Limitations

(1) A promise to pay all or part of an antecedent contractual or quasi-contractual indebtedness owed by the promisor is binding if the indebtedness is still enforceable or would be except for the effect of a statute of limitations.
(2) The following facts operate as such a promise unless other facts indicate a different intention:
(a) A voluntary acknowledgment to the obligee, admitting the present existence of the antecedent indebtedness; or
(b) A voluntary transfer of money, a negotiable instrument, or other thing by the obligor to the obligee, made as interest on or part payment of or collateral security for the antecedent indebtedness; or
(c) A statement to the obligee that the statute of limitations will not be pleaded as a defense.

§ 83. Promise To Pay Indebtedness Discharged In Bankruptcy

An express promise to pay all or part of an indebtedness of the promisor, discharged or dischargeable in bankruptcy proceedings begun before the promise is made, is binding.

§ 84. Promise To Perform A Duty In Spite Of Non-Occurrence Of A Condition

(1) Except as stated in Subsection (2), a promise to perform all or part of a conditional duty under an antecedent contract in spite of the non-occurrence of the condition is binding, whether the promise is made before or after the time for the condition to occur, unless
(a) occurrence of the condition was a material part of the agreed exchange for the performance of the duty and the promisee was under no duty that it occur; or

(b) uncertainty of the occurrence of the condition was an element of the risk assumed by the promisor.
(2) If such a promise is made before the time for the occurrence of the condition has expired and the condition is within the control of the promisee or a beneficiary, the promisor can make his duty again subject to the condition by notifying the promisee or beneficiary of his intention to do so if
(a) the notification is received while there is still a reasonable time to cause the condition to occur under the antecedent terms or an extension given by the promisor; and
(b) reinstatement of the requirement of the condition is not unjust because of a material change of position by the promisee or beneficiary; and
(c) the promise is not binding apart from the rule stated in Subsection (1).

§ 85. Promise To Perform A Voidable Duty

Except as stated in § 93, a promise to perform all or part of an antecedent contract of the promisor, previously voidable by him, but not avoided prior to the making of the promise, is binding.

§ 86. Promise For Benefit Received

(1) A promise made in recognition of a benefit previously received by the promisor from the promisee is binding to the extent necessary to prevent injustice.
(2) A promise is not binding under Subsection (1)
(a) if the promisee conferred the benefit as a gift or for other reasons the promisor has not been unjustly enriched; or
(b) to the extent that its value is disproportionate to the benefit.

§ 87. Option Contract

(1) An offer is binding as an option contract if it
(a) is in writing and signed by the offeror, recites a purported consideration for the making of the offer, and proposes an exchange on fair terms within a reasonable time; or
(b) is made irrevocable by statute.
(2) An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.

§ 89. Modification Of Executory Contract

A promise modifying a duty under a contract not fully performed on either side is binding
(a) if the modification is fair and equitable in view of circumstances not anticipated by the parties when the contract was made; or
(b) to the extent provided by statute; or
(c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.

§ 90. Promise Reasonably Inducing Action Or Forbearance

(1) 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.
(2) A charitable subscription or a marriage settlement is binding under Subsection (1) without proof that the promise induced action or forbearance.

Topic 3. Contracts Under Seal; Writing As A Statutory Substitute For The Seal

§ 95. Requirements For Sealed Contract Or Written Contract Or Instrument

(1) In the absence of statute a promise is binding without consideration if
(a) it is in writing and sealed; and
(b) the document containing the promise is delivered; and
(c) the promisor and promisee are named in the document or so described as to be capable of identification when it is delivered.
(2) When a statute provides in effect that a written contract or instrument is binding without consideration or that lack of consideration is an affirmative defense to an action on a written contract or instrument, in order to be subject to the statute a promise must either
(a) be expressed in a document signed or otherwise assented to by the promisor and delivered; or
(b) be expressed in a writing or writings to which both promisor and promisee manifest assent.

§ 96. What Constitutes A Seal

(1) A seal is a manifestation in tangible and conventional form of an intention that a document be sealed.
(2) A seal may take the form of a piece of wax, a wafer or other substance affixed to the document or of an impression made on the document.
(3) By statute or decision in most States in which the seal retains significance a seal may take the form of a written or printed seal, word, scrawl or other sign.

Chapter 5. The Statute Of Frauds

§ 110. Classes Of Contracts Covered

(1) The following classes of contracts are subject to a statute, commonly called the Statute of Frauds, forbidding enforcement unless there is a written memorandum or an applicable exception:
(a) a contract of an executor or administrator to answer for a duty of his decedent (the executor-administrator provision);
(b) a contract to answer for the duty of another (the suretyship provision);
(c) a contract made upon consideration of marriage (the marriage provision);
(d) a contract for the sale of an interest in land (the land contract provision);
(e) a contract that is not to be performed within one year from the making thereof (the one-year provision).
(2) The following classes of contracts, which were traditionally subject to the Statute of Frauds, are now governed by Statute of Frauds provisions of the Uniform Commercial Code:

(a) a contract for the sale of goods for the price of $500 or more (Uniform Commercial Code § 2-201);
(b) a contract for the sale of securities (Uniform Commercial Code § 8-319);
(c) a contract for the sale of personal property not otherwise covered, to the extent of enforcement by way of action or defense beyond $5,000 in amount or value of remedy (Uniform Commercial Code § 1-206).
(3) In addition the Uniform Commercial Code requires a writing signed by the debtor for an agreement which creates or provides for a security interest in personal property or fixtures not in the possession of the secured party.
(4) Statutes in most states provide that no acknowledgment or promise is sufficient evidence of a new or continuing contract to take a case out of the operation of a statute of limitations unless made in some writing signed by the party to be charged, but that the statute does not alter the effect of any payment of principal or interest.
(5) In many states other classes of contracts are subject to a requirement of a writing.

Topic 7. Consequences Of Non-Compliance

§ 139. Enforcement By Virtue Of Action In Reliance

(1) 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 the action or forbearance is enforceable notwithstanding the Statute of Frauds if injustice can be avoided only by enforcement of the promise. The remedy granted for breach is to be limited as justice requires.
(2) In determining whether injustice can be avoided only by enforcement of the promise, the following circumstances are significant:
(a) the availability and adequacy of other remedies, particularly cancellation and restitution;
(b) the definite and substantial character of the action or forbearance in relation to the remedy sought;
(c) the extent to which the action or forbearance corroborates evidence of the making and terms of the promise, or the making and terms are otherwise established by clear and convincing evidence;
(d) the reasonableness of the action or forbearance;
(e) the extent to which the action or forbearance was foreseeable by the promisor.

Chapter 6. Mistake

§ 152. When Mistake Of Both Parties Makes A Contract Voidable

(1) Where a mistake of both parties at the time a contract was made as to a basic assumption on which the contract was made has a material effect on the agreed exchange of performances, the contract is voidable by the adversely affected party unless he bears the risk of the mistake under the rule stated in § 154.
(2) In determining whether the mistake has a material effect on the agreed exchange of performances, account is taken of any relief by way of reformation, restitution, or otherwise.

§ 153. When Mistake Of One Party Makes A Contract Voidable

Where a mistake of one party at the time a contract was made as to a basic assumption on

which he made the contract has a material effect on the agreed exchange of performances that is adverse to him, the contract is voidable by him if he does not bear the risk of the mistake under the rule stated in § 154, and
(a) the effect of the mistake is such that enforcement of the contract would be unconscionable, or
(b) the other party had reason to know of the mistake or his fault caused the mistake.

§ 154. When A Party Bears The Risk Of A Mistake
A party bears the risk of a mistake when
(a) the risk is allocated to him by agreement of the parties, or
(b) he is aware, at the time the contract is made, that he has only limited knowledge with respect to the facts to which the mistake relates but treats his limited knowledge as sufficient, or
(c) the risk is allocated to him by the court on the ground that it is reasonable in the circumstances to do so.

§ 158. Relief Including Restitution
(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 376.
(2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

Chapter 7. Misrepresentation, Duress And Undue Influence

Chapter 8. Unenforceability On Grounds Of Public Policy

Chapter 9. The Scope Of Contractual Obligations
Topic 1. The Meaning Of Agreements
§ 201. Whose Meaning Prevails
(1) Where the parties have attached the same meaning to a promise or agreement or a term thereof, it is interpreted in accordance with that meaning.
(2) Where the parties have attached different meanings to a promise or agreement or a term thereof, it is interpreted in accordance with the meaning attached by one of them if at the time the agreement was made
(a) that party did not know of any different meaning attached by the other, and the other knew the meaning attached by the first party; or
(b) that party had no reason to know of any different meaning attached by the other, and the other had reason to know the meaning attached by the first party.
(3) Except as stated in this Section, neither party is bound by the meaning attached by the other, even though the result may be a failure of mutual assent.

§ 204. Supplying An Omitted Essential Term
When the parties to a bargain sufficiently defined to be a contract have not agreed with

respect to a term which is essential to a determination of their rights and duties, a term which is reasonable in the circumstances is supplied by the court.

Topic 2. Considerations Of Fairness And The Public Interest

§ 205. Duty Of Good Faith And Fair Dealing

Every contract imposes upon each party a duty of good faith and fair dealing in its performance and its enforcement.

§ 208. Unconscionable Contract Or Term

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Topic 3. Effect Of Adoption Of A Writing

§ 209. Integrated Agreements

(1) An integrated agreement is a writing or writings constituting a final expression of one or more terms of an agreement.

(2) Whether there is an integrated agreement is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

(3) Where the parties reduce an agreement to a writing which in view of its completeness and specificity reasonably appears to be a complete agreement, it is taken to be an integrated agreement unless it is established by other evidence that the writing did not constitute a final expression.

§ 210. Completely And Partially Integrated Agreements

(1) A completely integrated agreement is an integrated agreement adopted by the parties as a complete and exclusive statement of the terms of the agreement.

(2) A partially integrated agreement is an integrated agreement other than a completely integrated agreement.

(3) Whether an agreement is completely or partially integrated is to be determined by the court as a question preliminary to determination of a question of interpretation or to application of the parol evidence rule.

§ 211. Standardized Agreements

(1) Except as stated in Subsection (3), where a party to an agreement signs or otherwise manifests assent to a writing and has reason to believe that like writings are regularly used to embody terms of agreements of the same type, he adopts the writing as an integrated agreement with respect to the terms included in the writing.

(2) Such a writing is interpreted wherever reasonable as treating alike all those similarly situated, without regard to their knowledge or understanding of the standard terms of the writing.

(3) Where the other party has reason to believe that the party manifesting such assent would

not do so if he knew that the writing contained a particular term, the term is not part of the agreement.

§ 213. Effect Of Integrated Agreement On Prior Agreements (Parol Evidence Rule)

(1) A binding integrated agreement discharges prior agreements to the extent that it is inconsistent with them.

(2) A binding completely integrated agreement discharges prior agreements to the extent that they are within its scope.

(3) An integrated agreement that is not binding or that is voidable and avoided does not discharge a prior agreement. But an integrated agreement, even though not binding, may be effective to render inoperative a term which would have been part of the agreement if it had not been integrated.

§ 214. Evidence Of Prior Or Contemporaneous Agreements And Negotiations

Agreements and negotiations prior to or contemporaneous with the adoption of a writing are admissible in evidence to establish

(a) that the writing is or is not an integrated agreement;

(b) that the integrated agreement, if any, is completely or partially integrated;

(c) the meaning of the writing, whether or not integrated;

(d) illegality, fraud, duress, mistake, lack of consideration, or other invalidating cause;

(e) ground for granting or denying rescission, reformation, specific performance, or other remedy.

§ 215. Contradiction Of Integrated Terms

Except as stated in the preceding Section, where there is a binding agreement, either completely or partially integrated, evidence of prior or contemporaneous agreements or negotiations is not admissible in evidence to contradict a term of the writing.

§ 216. Consistent Additional Terms

(1) Evidence of a consistent additional term is admissible to supplement an integrated agreement unless the court finds that the agreement was completely integrated.

(2) An agreement is not completely integrated if the writing omits a consistent additional agreed term which is

(a) agreed to for separate consideration, or

(b) such a term as in the circumstances might naturally be omitted from the writing.

§ 217. Integrated Agreement Subject To Oral Requirement Of A Condition

Where the parties to a written agreement agree orally that performance of the agreement is subject to the occurrence of a stated condition, the agreement is not integrated with respect to the oral condition.

Topic 5. Conditions And Similar Events

§ 224. Condition Defined

A condition is an event, not certain to occur, which must occur, unless its non-occurrence is

excused, before performance under a contract becomes due.

§ 225. Effects Of The Non-Occurrence Of A Condition

(1) Performance of a duty subject to a condition cannot become due unless the condition occurs or its non-occurrence is excused.

(2) Unless it has been excused, the non-occurrence of a condition discharges the duty when the condition can no longer occur.

(3) Non-occurrence of a condition is not a breach by a party unless he is under a duty that the condition occur.

§ 229. Excuse Of A Condition To Avoid Forfeiture

To the extent that the non-occurrence of a condition would cause disproportionate forfeiture, a court may excuse the non-occurrence of that condition unless its occurrence was a material part of the agreed exchange.

Chapter 10. Performance And Non-Performance

Topic 1. Performances To Be Exchanged Under An Exchange Of Promises

§ 234. Order Of Performances

(1) Where all or part of the performances to be exchanged under an exchange of promises can be rendered simultaneously, they are to that extent due simultaneously, unless the language or the circumstances indicate the contrary.

(2) Except to the extent stated in Subsection (1), where the performance of only one party under such an exchange requires a period of time, his performance is due at an earlier time than that of the other party, unless the language or the circumstances indicate the contrary.

Topic 2. Effect Of Performance And Non-Performance

§ 236. Claims For Damages For Total And For Partial Breach

(1) A claim for damages for total breach is one for damages based on all of the injured party's remaining rights to performance.

(2) A claim for damages for partial breach is one for damages based on only part of the injured party's remaining rights to performance.

§ 237. Effect On Other Party's Duties Of A Failure To Render Performance

Except as stated in § 240, it is a condition of each party's remaining duties to render performances to be exchanged under an exchange of promises that there be no uncured material failure by the other party to render any such performance due at an earlier time.

§ 238. Effect On Other Party's Duties Of A Failure To Offer Performance

Where all or part of the performances to be exchanged under an exchange of promises are due simultaneously, it is a condition of each party's duties to render such performance that the other party either render or, with manifested present ability to do so, offer performance of his part of the simultaneous exchange.

§ 239. Effect On Other Party's Duties Of A Failure Justified By Non-Occurrence Of A

Condition

(1) A party's failure to render or to offer performance may, except as stated in Subsection (2), affect the other party's duties under the rules stated in §§ 237 and 238 even though failure is justified by the non-occurrence of a condition.

(2) The rule stated in Subsection (1) does not apply if the other party assumed the risk that he would have to perform in spite of such a failure.

§ 240. Part Performances As Agreed Equivalents

If the performances to be exchanged under an exchange of promises can be apportioned into corresponding pairs of part performances so that the parts of each pair are properly regarded as agreed equivalents, a party's performance of his part of such a pair has the same effect on the other's duties to render performance of the agreed equivalent as it would have if only that pair of performances had been promised.

§ 241. Circumstances Significant In Determining Whether A Failure Is Material

In determining whether a failure to render or to offer performance is material, the following circumstances are significant:

(a) the extent to which the injured party will be deprived of the benefit which he reasonably expected;

(b) the extent to which the injured party can be adequately compensated for the part of that benefit of which he will be deprived;

(c) the extent to which the party failing to perform or to offer to perform will suffer forfeiture;

(d) the likelihood that the party failing to perform or to offer to perform will cure his failure, taking account of all the circumstances including any reasonable assurances;

(e) the extent to which the behavior of the party failing to perform or to offer to perform comports with standards of good faith and fair dealing.

§ 242. Circumstances Significant In Determining When Remaining Duties Are Discharged

In determining the time after which a party's uncured material failure to render or to offer performance discharges the other party's remaining duties to render performance under the rules stated in §§ 237 and 238, the following circumstances are significant:

(a) those stated in § 241;

(b) the extent to which it reasonably appears to the injured party that delay may prevent or hinder him in making reasonable substitute arrangements;

(c) the extent to which the agreement provides for performance without delay, but a material failure to perform or to offer to perform on a stated day does not of itself discharge the other party's remaining duties unless the circumstances, including the language of the agreement, indicate that performance or an offer to perform by that day is important.

§ 243. Effect Of A Breach By Non-Performance As Giving Rise To A Claim For Damages For Total Breach

(1) With respect to performances to be exchanged under an exchange of promises, a breach

by non-performance gives rise to a claim for damages for total breach only if it discharges the injured party's remaining duties to render such performance, other than a duty to render an agreed equivalent under § 240.
(2) Except as stated in Subsection (3), a breach by non-performance accompanied or followed by a repudiation gives rise to a claim for damages for total breach.
(3) Where at the time of the breach the only remaining duties of performance are those of the party in breach and are for the payment of money in installments not related to one another, his breach by non-performance as to less than the whole, whether or not accompanied or followed by a repudiation, does not give rise to a claim for damages for total breach.
(4) In any case other than those stated in the preceding subsections, a breach by non-performance gives rise to a claim for total breach only if it so substantially impairs the value of the contract to the injured party at the time of the breach that it is just in the circumstances to allow him to recover damages based on all his remaining rights to performance.

Topic 3. Effect Of Prospective Non-Performance

§ 250. When A Statement Or An Act Is A Repudiation
A repudiation is
(a) a statement by the obligor to the obligee indicating that the obligor will commit a breach that would of itself give the obligee a claim for damages for total breach under § 243, or
(b) a voluntary affirmative act which renders the obligor unable or apparently unable to perform without such a breach.

§ 251. When A Failure To Give Assurance May Be Treated As A Repudiation
(1) Where reasonable grounds arise to believe that the obligor will commit a breach by non-performance that would of itself give the obligee a claim for damages for total breach under § 243, the obligee may demand adequate assurance of due performance and may, if reasonable, suspend any performance for which he has not already received the agreed exchange until he receives such assurance.
(2) The obligee may treat as a repudiation the obligor's failure to provide within a reasonable time such assurance of due performance as is adequate in the circumstances of the particular case.

§ 253. Effect Of A Repudiation As A Breach And On Other Party's Duties
(1) Where an obligor repudiates a duty before he has committed a breach by non-performance and before he has received all of the agreed exchange for it, his repudiation alone gives rise to a claim for damages for total breach.
(2) Where performances are to be exchanged under an exchange of promises, one party's repudiation of a duty to render performance discharges the other party's remaining duties to render performance.

§ 254. Effect Of Subsequent Events On Duty To Pay Damages
(1) A party's duty to pay damages for total breach by repudiation is discharged if it appears

after the breach that there would have been a total failure by the injured party to perform his return promise.
(2) A party's duty to pay damages for total breach by repudiation is discharged if it appears after the breach that the duty that he repudiated would have been discharged by impracticability or frustration before any breach by non- performance.

§ 255. Effect Of A Repudiation As Excusing The Non-Occurrence Of A Condition
Where a party's repudiation contributes materially to the non-occurrence of a condition of one of his duties, the non-occurrence is excused.

§ 256. Nullification Of Repudiation Or Basis For Repudiation
(1) The effect of a statement as constituting a repudiation under § 250 or the basis for a repudiation under § 251 is nullified by a retraction of the statement if notification of the retraction comes to the attention of the injured party before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final.
(2) The effect of events other than a statement as constituting a repudiation under § 250 or the basis for a repudiation under § 251 is nullified if, to the knowledge of the injured party, those events have ceased to exist before he materially changes his position in reliance on the repudiation or indicates to the other party that he considers the repudiation to be final.

Chapter 11. Impracticability Of Performance And Frustration Of Purpose
§ 261. Discharge By Supervening Impracticability
Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

§ 265. Discharge By Supervening Frustration
Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary.

§ 266. Existing Impracticability Or Frustration
(1) Where, at the time a contract is made, a party's performance under it is impracticable without his fault because of a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty to render that performance arises, unless the language or circumstances indicate the contrary.
(2) Where, at the time a contract is made, a party's principal purpose is substantially frustrated without his fault by a fact of which he has no reason to know and the non-existence of which is a basic assumption on which the contract is made, no duty of that party to render performance arises, unless the language or circumstances indicate the contrary.

§ 272. Relief Including Restitution

(1) In any case governed by the rules stated in this Chapter, either party may have a claim for relief including restitution under the rules stated in §§ 240 and 377.

(2) In any case governed by the rules stated in this Chapter, if those rules together with the rules stated in Chapter 16 will not avoid injustice, the court may grant relief on such terms as justice requires including protection of the parties' reliance interests.

Chapter 12. Discharge By Assent Or Alteration

Chapter 13. Joint And Several Promisors And Promisees

Chapter 14. Contract Beneficiaries

§ 302. Intended And Incidental Beneficiaries

(1) Unless otherwise agreed between promisor and promisee, a beneficiary of a promise is an intended beneficiary if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties and either

(a) the performance of the promise will satisfy an obligation of the promisee to pay money to the beneficiary; or

(b) the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance.

(2) An incidental beneficiary is a beneficiary who is not an intended beneficiary.

§ 309. Defenses Against The Beneficiary

(1) A promise creates no duty to a beneficiary unless a contract is formed between the promisor and the promisee; and if a contract is voidable or unenforceable at the time of its formation the right of any beneficiary is subject to the infirmity.

(2) If a contract ceases to be binding in whole or in part because of impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance, the right of any beneficiary is to that extent discharged or modified.

(3) Except as stated in Subsections (1) and (2) and in § 311 or as provided by the contract, the right of any beneficiary against the promisor is not subject to the promisor's claims or defenses against the promisee or to the promisee's claims or defenses against the beneficiary.

(4) A beneficiary's right against the promisor is subject to any claim or defense arising from his own conduct or agreement.

§ 311. Variation Of A Duty To A Beneficiary

(1) Discharge or modification of a duty to an intended beneficiary by conduct of the promisee or by a subsequent agreement between promisor and promisee is ineffective if a term of the promise creating the duty so provides.

(2) In the absence of such a term, the promisor and promisee retain power to discharge or modify the duty by subsequent agreement.

(3) Such a power terminates when the beneficiary, before he receives notification of the discharge or modification, materially changes his position in justifiable reliance on the promise or brings suit on it or manifests assent to it at the request of the promisor or

promisee.
(4) If the promisee receives consideration for an attempted discharge or modification of the promisor's duty which is ineffective against the beneficiary, the beneficiary can assert a right to the consideration so received. The promisor's duty is discharged to the extent of the amount received by the beneficiary.

§ 313. Government Contracts

(1) The rules stated in this Chapter apply to contracts with a government or governmental agency except to the extent that application would contravene the policy of the law authorizing the contract or prescribing remedies for its breach.
(2) In particular, a promisor who contracts with a government or governmental agency to do an act for or render a service to the public is not subject to contractual liability to a member of the public for consequential damages resulting from performance or failure to perform unless
(a) the terms of the promise provide for such liability; or
(b) the promisee is subject to liability to the member of the public for the damages and a direct action against the promisor is consistent with the terms of the contract and with the policy of the law authorizing the contract and prescribing remedies for its breach.

Chapter 15. Assignment And Delegation

Topic 1. What Can Be Assigned Or Delegated

§ 317. Assignment Of A Right

(1) An assignment of a right is a manifestation of the assignor's intention to transfer it by virtue of which the assignor's right to performance by the obligor is extinguished in whole or in part and the assignee acquires a right to such performance.
(2) A contractual right can be assigned unless
(a) the substitution of a right of the assignee for the right of the assignor would materially change the duty of the obligor, or materially increase the burden or risk imposed on him by his contract, or materially impair his chance of obtaining return performance, or materially reduce its value to him, or
(b) the assignment is forbidden by statute or is otherwise inoperative on grounds of public policy, or
(c) assignment is validly precluded by contract.

§ 318. Delegation Of Performance Of Duty

(1) An obligor can properly delegate the performance of his duty to another unless the delegation is contrary to public policy or the terms of his promise.
(2) Unless otherwise agreed, a promise requires performance by a particular person only to the extent that the obligee has a substantial interest in having that person perform or control the acts promised.
(3) Unless the obligee agrees otherwise, neither delegation of performance nor a contract to assume the duty made with the obligor by the person delegated discharges any duty or liability of the delegating obligor.

§ 321. Assignment Of Future Rights

(1) Except as otherwise provided by statute, an assignment of a right to payment expected to arise out of an existing employment or other continuing business relationship is effective in the same way as an assignment of an existing right.

(2) Except as otherwise provided by statute and as stated in Subsection (1), a purported assignment of a right expected to arise under a contract not in existence operates only as a promise to assign the right when it arises and as a power to enforce it.

§ 322. Contractual Prohibition Of Assignment

(1) Unless the circumstances indicate the contrary, a contract term prohibiting assignment of "the contract" bars only the delegation to an assignee of the performance by the assignor of a duty or condition.

(2) A contract term prohibiting assignment of rights under the contract, unless a different intention is manifested,

(a) does not forbid assignment of a right to damages for breach of the whole contract or a right arising out of the assignor's due performance of his entire obligation;

(b) gives the obligor a right to damages for breach of the terms forbidding assignment but does not render the assignment ineffective;

(c) is for the benefit of the obligor, and does not prevent the assignee from acquiring rights against the assignor or the obligor from discharging his duty as if there were no such prohibition.

Topic 2. Mode Of Assignment Or Delegation

§ 328. Interpretation Of Words Of Assignment; Effect Of Acceptance Of Assignment

(1) Unless the language or the circumstances indicate the contrary, as in an assignment for security, an assignment of "the contract" or of "all my rights under the contract" or an assignment in similar general terms is an assignment of the assignor's rights and a delegation of his unperformed duties under the contract.

(2) Unless the language or the circumstances indicate the contrary, the acceptance by an assignee of such an assignment operates as a promise to the assignor to perform the assignor's unperformed duties, and the obligor of the assigned rights is an intended beneficiary of the promise.

Caveat: The Institute expresses no opinion as to whether the rule stated in Subsection (2) applies to an assignment by a purchaser of his rights under a contract for the sale of land.

Topic 3. Effect Between Assignor And Assignee

§ 332. Revocability Of Gratuitous Assignments

(1) Unless a contrary intention is manifested, a gratuitous assignment is irrevocable if

(a) the assignment is in a writing either signed or under seal that is delivered by the assignor; or

(b) the assignment is accompanied by delivery of a writing of a type customarily accepted as a symbol or as evidence of the right assigned.

(2) Except as stated in this Section, a gratuitous assignment is revocable and the right of the assignee is terminated by the assignor's death or incapacity, by a subsequent assignment by

the assignor, or by notification from the assignor received by the assignee or by the obligor.
(3) A gratuitous assignment ceases to be revocable to the extent that before the assignee's right is terminated he obtains
(a) payment or satisfaction of the obligation, or
(b) judgment against the obligor, or
(c) a new contract of the obligor by novation.
(4) A gratuitous assignment is irrevocable to the extent necessary to avoid injustice where the assignor should reasonably expect the assignment to induce action or forbearance by the assignee or a subassignee and the assignment does induce such action or forbearance.
(5) An assignment is gratuitous unless it is given or taken
(a) in exchange for a performance or return promise that would be consideration for a promise; or
(b) as security for or in total or partial satisfaction of a pre-existing debt or other obligation.

§ 333. Warranties Of An Assignor

(1) Unless a contrary intention is manifested, one who assigns or purports to assign a right by assignment under seal or for value warrants to the assignee
(a) that he will do nothing to defeat or impair the value of the assignment and has no knowledge of any fact which would do so;
(b) that the right, as assigned, actually exists and is subject to no limitations or defenses good against the assignor other than those stated or apparent at the time of the assignment;
(c) that any writing evidencing the right which is delivered to the assignee or exhibited to him to induce him to accept the assignment is genuine and what it purports to be.
(2) An assignment does not of itself operate as a warranty that the obligor is solvent or that he will perform his obligation.
(3) An assignor is bound by affirmations and promises to the assignee with reference to the right assigned in the same way and to the same extent that one who transfers goods is bound in like circumstances.
(4) An assignment of a right to a sub-assignee does not operate as an assignment of the assignee's rights under his assignor's warranties unless an intention is manifested to assign the rights under the warranties.

Topic 4. Effect On The Obligor's Duty

§ 336. Defenses Against An Assignee

(1) By an assignment the assignee acquires a right against the obligor only to the extent that the obligor is under a duty to the assignor; and if the right of the assignor would be voidable by the obligor or unenforceable against him if no assignment had been made, the right of the assignee is subject to the infirmity.
(2) The right of an assignee is subject to any defense or claim of the obligor which accrues before the obligor receives notification of the assignment, but not to defenses or claims which accrue thereafter except as stated in this Section or as provided by statute.
(3) Where the right of an assignor is subject to discharge or modification in whole or in party by impracticability, public policy, non-occurrence of a condition, or present or prospective failure of performance by an obligee, the right of the assignee is to that extent subject to

discharge or modification even after the obligor receives notification of the assignment.
(4) An assignee's right against the obligor is subject to any defense or claim arising from his conduct or to which he was subject as a party or a prior assignee because he had notice.

§ 338. Discharge Of An Obligor After Assignment

(1) Except as stated in this Section, notwithstanding an assignment, the assignor retains his power to discharge or modify the duty of the obligor to the extent that the obligor performs or otherwise gives value until but not after the obligor receives notification that the right has been assigned and that performance is to be rendered to the assignee.
(2) So far as an assigned right is conditional on the performance of a return promise, and notwithstanding notification of the assignment, any modification of or substitution for the contract made by the assignor and obligor in good faith and in accordance with reasonable commercial standards is effective against the assignee. The assignee acquires corresponding rights under the modified or substituted contract.
(3) Notwithstanding a defect in the right of an assignee, he has the same power his assignor had to discharge or modify the duty of the obligor to the extent that the obligor gives value or otherwise changes his position in good faith and without knowledge or reason to know of the defect.
(4) Where there is a writing of a type customarily accepted as a symbol or as evidence of the right assigned, a discharge or modification is not effective
(a) against the owner or an assignor having a power of avoidance, unless given by him or by a person in possession of the writing with his consent and any necessary indorsement or assignment;
(b) against a subsequent assignee who takes possession of the writing and gives value in good faith and without knowledge or reason to know of the discharge or modification.

Chapter 16. Remedies

Topic 2. Enforcement By Award Of Damages

§ 346. Availability Of Damages

(1) The injured party has a right to damages for any breach by a party against whom the contract is enforceable unless the claim for damages has been suspended or discharged.
(2) If the breach caused no loss or if the amount of the loss is not proved under the rules stated in this Chapter, a small sum fixed without regard to the amount of loss will be awarded as nominal damages.

§ 347. Measure Of Damages In General

Subject to the limitations stated in §§ 350-53, the injured party has a right to damages based on his expectation interest as measured by
(a) the loss in the value to him of the other party's performance caused by its failure or deficiency, plus
(b) any other loss, including incidental or consequential loss, caused by the breach, less
(c) any cost or other loss that he has avoided by not having to perform.

§ 348. Alternatives To Loss In Value Of Performance

(1) If a breach delays the use of property and the loss in value to the injured party is not proved with reasonable certainty, he may recover damages based on the rental value of the property or on interest on the value of the property.
(2) If a breach results in defective or unfinished construction and the loss in value to the injured party is not proved with sufficient certainty, he may recover damages based on.
(a) the diminution in the market price of the property caused by the breach, or
(b) the reasonable cost of completing performance or of remedying the defects if that cost is not clearly disproportionate to the probable loss in value to him.
(3) If a breach is of a promise conditioned on a fortuitous event and it is uncertain whether the event would have occurred had there been no breach, the injured party may recover damages based on the value of the conditional right at the time of breach.

§ 349. Damages Based On Reliance Interest

As an alternative to the measure of damages stated in § 347, the injured party has a right to damages based on his reliance interest, including expenditures made in preparation for performance or in performance, less any loss that the party in breach can prove with reasonable certainty the injured party would have suffered had the contract been performed.

§ 350. Avoidability As A Limitation On Damages

(1) Except as stated in Subsection (2), damages are not recoverable for loss that the injured party could have avoided without undue risk, burden or humiliation.
(2) The injured party is not precluded from recovery by the rule stated in Subsection (1) to the extent that he has made reasonable but unsuccessful efforts to avoid loss.

§ 351. Unforeseeability And Related Limitations On Damages

(1) Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made.
(2) Loss may be foreseeable as a probable result of a breach because it follows from the breach
(a) in the ordinary course of events, or
(b) as a result of special circumstances, beyond the ordinary course of events, that the party in breach had reason to know.
(3) A court may limit damages for foreseeable loss by excluding recovery for loss of profits, by allowing recovery only for loss incurred in reliance, or otherwise if it concludes that in the circumstances justice so requires in order to avoid disproportionate compensation.

§ 352. Uncertainty As A Limitation On Damages

Damages are not recoverable for loss beyond an amount that the evidence permits to be established with reasonable certainty.

§ 353. Loss Due To Emotional Disturbance

Recovery for emotional disturbance will be excluded unless the breach also caused bodily harm or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.

§ 355. Punitive Damages

Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable.

Topic 3. Enforcement By Specific Performance And Injunction

§ 357. Availability Of Specific Performance And Injunction

(1) Subject to the rules stated in §§ 359-69, specific performance of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty.

(2) Subject to the rules stated in §§ 359-69, an injunction against breach of a contract duty will be granted in the discretion of the court against a party who has committed or is threatening to commit a breach of the duty if

(a) the duty is one of forbearance, or

(b) the duty is one to act and specific performance would be denied only for reasons that are inapplicable to an injunction.

§ 358. Form Of Order And Other Relief

(1) An order of specific performance or an injunction will be so drawn as best to effectuate the purposes for which the contract was made and on such terms as justice requires. It need not be absolute in form and the performance that it requires need not be identical with that due under the contract.

(2) If specific performance or an injunction is denied as to part of the performance that is due, it may nevertheless be granted as to the remainder.

(3) In addition to specific performance or an injunction, damages and other relief may be awarded in the same proceeding and an indemnity against future harm may be required.

§ 359. Effect Of Adequacy Of Damages

(1) Specific performance or an injunction will not be ordered if damages would be adequate to protect the expectation interest of the injured party.

(2) The adequacy of the damage remedy for failure to render one part of the performance due does not preclude specific performance or injunction as to the contract as a whole.

(3) Specific performance or an injunction will not be refused merely because there is a remedy for breach other than damages, but such a remedy may be considered in exercising discretion under the rule stated in § 357.

§ 360. Factors Affecting Adequacy Of Damages

In determining whether the remedy in damages would be adequate, the following circumstances are significant:

(a) the difficulty of proving damages with reasonable certainty,

(b) the difficulty of procuring a suitable substitute performance by means of money awarded as damages, and

(c) the likelihood that an award of damages could not be collected.

§ 362. Effect Of Uncertainty Of Terms

Specific performance or an injunction will not be granted unless the terms of the contract are sufficiently certain to provide a basis for an appropriate order.

§ 363. Effect Of Insecurity As To The Agreed Exchange

Specific performance or an injunction may be refused if a substantial part of the agreed exchange for the performance to be compelled is unperformed and its performance is not secured to the satisfaction of the court.

§ 364. Effect Of Unfairness

(1) Specific performance or an injunction will be refused if such relief would be unfair because

(a) the contract was induced by mistake or by unfair practices,

(b) the relief would cause unreasonable hardship or loss to the party in breach or to third persons, or

(c) the exchange is grossly inadequate or the terms of the contract are otherwise unfair.

(2) Specific performance or an injunction will be granted in spite of a term of the agreement if denial of such relief would be unfair because it would cause unreasonable hardship or loss to the party seeking relief or to third persons.

§ 365. Effect Of Public Policy

Specific performance or an injunction will not be granted if the act or forbearance that would be compelled or the use of compulsion is contrary to public policy.

§ 366. Effect Of Difficulty In Enforcement Or Supervision

A promise will not be specifically enforced if the character and magnitude of the performance would impose on the court burdens in enforcement or supervision that are disproportionate to the advantages to be gained from enforcement and to the harm to be suffered from its denial.

§ 367. Contracts For Personal Service Or Supervision

(1) A promise to render personal service will not be specifically enforced.

(2) A promise to render personal service exclusively for one employer will not be enforced by an injunction against serving another if its probable result will be to compel a performance involving personal relations the enforced continuance of which is undesirable or will be to leave the employee without other reasonable means of making a living.

Topic 4. Restitution

§ 370. Requirement That Benefit Be Conferred

A party is entitled to restitution under the rules stated in this Restatement only to the extent that he has conferred a benefit on the other party by way of part performance or reliance.

§ 371. Measure Of Restitution Interest

If a sum of money is awarded to protect a party's restitution interest, it may as justice requires be measured by either

(a) the reasonable value to the other party of what he received in terms of what it would have cost him to obtain it from a person in the claimant's position, or
(b) the extent to which the other party's property has been increased in value or his other interests advanced.

§ 373. Restitution When Other Party Is In Breach

(1) Subject to the rule stated in Subsection (2), on a breach by non-performance that gives rise to a claim for damages for total breach or on a repudiation, the injured party is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.
(2) The injured party has no right to restitution if he has performed all of his duties under the contract and no performance by the other party remains due other than payment of a definite sum of money for that performance.

§ 374. Restitution In Favor Of Party In Breach

(1) Subject to the rule stated in Subsection (2), if a party justifiably refuses to perform on the ground that his remaining duties of performance have been discharged by the other party's breach, the party in breach is entitled to restitution for any benefit that he has conferred by way of part performance or reliance in excess of the loss that he has caused by his own breach.
(2) To the extent that, under the manifested assent of the parties, a party's performance is to be retained in the case of breach, that party is not entitled to restitution if the value of the performance as liquidated damages is reasonable in the light of the anticipated or actual loss caused by the breach and the difficulties of proof of loss.

§ 376. Restitution When Contract Is Voidable

A party who has avoided a contract on the ground of lack of capacity, mistake, misrepresentation, duress, undue influence or abuse of a fiduciary relation is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

§ 377. Restitution In Cases Of Impracticability, Frustration, Non-Occurrence Of Condition Or Disclaimer By Beneficiary

A party whose duty of performance does not arise or is discharged as a result of impracticability of performance, frustration of purpose, non-occurrence of a condition or disclaimer by a beneficiary is entitled to restitution for any benefit that he has conferred on the other party by way of part performance or reliance.

Uniform Commercial Code

Article 2 Sales

Part 2. Form, Formation and Readjustment of Contract

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

(1) Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense unless there is some writing sufficient to indicate that a contract for sale has been made between the parties and signed by the party against whom enforcement is sought or by his authorized agent or broker. A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing.

(2) 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 requirements of subsection (1) against such party unless written notice of objection to its contents is given within 10 days after it is received.

(3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable

(a) if the goods are to be specially manufactured for the buyer and are not suitable for sale to others in the ordinary course of the seller's business and the seller, before notice of repudiation is received and under circumstances which reasonably indicate that the goods are for the buyer, has made either a substantial beginning of their manufacture or commitments for their procurement; or

(b) if the party against whom enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted; or

(c) with respect to goods for which payment has been made and accepted or which have been received and accepted (Sec. 2-606).

§ 2-202. Final Written Expression: Parol or Extrinsic Evidence.

Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented

(a) by <<+course of performance,+>> course of dealing<<+,+>> or usage of trade (Section <<-1-205->> <<+1-303+>>) <<-or by course of performance (Section 2-208)->>; and

(b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement. (As amended in 2001.)

§ 2-203. Seals Inoperative.

The affixing of a seal to a writing evidencing a contract for sale or an offer to buy or sell goods does not constitute the writing a sealed instrument and the law with respect to sealed instruments does not apply to such a contract or offer.

§ 2-205. Firm Offers.

An offer by a merchant to buy or sell goods in a signed writing which by its terms give assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

§ 2-207. Additional Terms in Acceptance or Confirmation.

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

(a) the offer expressly limits acceptance to the terms of the offer;

(b) they materially alter it; or

(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received.

(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

§ 2-209. Modification, Rescission and Waiver.

(1) An agreement modifying a contract within this Article needs no consideration to be binding.

(2) A signed agreement which excludes modification or rescission except by a signed writing cannot be otherwise modified or rescinded, but except as between merchants such a requirement on a form supplied by the merchant must be separately signed by the other party.

(3) The requirements of the statute of frauds section of this Article (Section 2-201) must be satisfied if the contract as modified is within its provisions.

(4) Although an attempt at modification or rescission does not satisfy the requirements of subsection (2) or (3) it can operate as a waiver.

(5) A party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification received by the other party that strict performance will be required of any term waived, unless the retraction would be unjust in view of a material change of position in reliance on the waiver.

Part 3. General Obligation and Construction of Contract

§ 2-305. Open Price Term.

(1) The parties if they so intend can conclude a contract for sale even though the price is not settled. In such a case the price is a reasonable price at the time for delivery if

(a) nothing is said as to price; or
(b) the price is left to be agreed by the parties and they fail to agree; or
(c) the price is to be fixed in terms of some agreed market or other standard as set or recorded by a third person or agency and it is not so set or recorded.
(2) A price to be fixed by the seller or by the buyer means a price for him to fix in good faith.
(3) When a price left to be fixed otherwise than by agreement of the parties fails to be fixed through fault of one party the other may at his option treat the contract as cancelled or himself fix a reasonable price.
(4) Where, however, the parties intend not to be bound unless the price be fixed or agreed and it is not fixed or agreed there is no contract. In such a case the buyer must return any goods already received or if unable so to do must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

Part 6. Breach, Repudiation and Excuse

§ 2-609. Right to Adequate Assurance of Performance.

(1) A contract for sale imposes an obligation on each party that the other's expectation of receiving due performance will not be impaired. When reasonable grounds for insecurity arise with respect to the performance of either party the other may in writing demand adequate assurance of due performance and until he receives such assurance may if commercially reasonable suspend any performance for which he has not already received the agreed return.
(2) Between merchants the reasonableness of grounds for insecurity and the adequacy of any assurance offered shall be determined according to commercial standards.
(3) Acceptance of any improper delivery or payment does not prejudice the aggrieved party's right to demand adequate assurance of future performance.
(4) After receipt of a justified demand failure to provide within a reasonable time not exceeding thirty days such assurance of due performance as is adequate under the circumstances of the particular case is a repudiation of the contract.

§ 2-615. Excuse by Failure of Presupposed Conditions.

Except so far as a seller may have assumed a greater obligation and subject to the preceding section on substituted performance:
(a) Delay in delivery or non-delivery in whole or in part by a seller who complies with paragraphs (b) and (c) is not a breach of his duty under a contract for sale if performance as agreed has been made impracticable by the occurrence of a contingency the non-occurrence of which was a basic assumption on which the contract was made or by compliance in good faith with any applicable foreign or domestic governmental regulation or order whether or not it later proves to be invalid.
(b) Where the causes mentioned in paragraph (a) affect only a part of the seller's capacity to perform, he must allocate production and deliveries among his customers but may at his option include regular customers not then under contract as well as his own requirements for further manufacture. He may so allocate in any manner which is fair and reasonable.
(c) The seller must notify the buyer seasonably that there will be delay or non-delivery and, when allocation is required under paragraph (b), of the estimated quota thus made available

for the buyer.

Part 7. Remedies

§ 2-718. Liquidation or Limitation of Damages, Deposits.

(1) Damages for breach by either party may be liquidated in the agreement but only at an amount which is reasonable in the light of the anticipated or actual harm caused by the breach, the difficulties of proof of loss, and the inconvenience or nonfeasibility of otherwise obtaining an adequate remedy. A term fixing unreasonably large liquidated damages is void as a penalty.

(2) Where the seller justifiably withholds delivery of goods because of the buyer's breach, the buyer is entitled to restitution of any amount by which the sum of his payments exceeds

(a) the amount to which the seller is entitled by virtue of terms liquidating the seller's damages in accordance with subsection (1), or

(b) in the absence of such terms, twenty per cent of the value of the total performance for which the buyer is obligated under the contract or $500, whichever is smaller.

(3) The buyer's right to restitution under subsection (2) is subject to offset to the extent that the seller establishes

(a) a right to recover damages under the provisions of this Article other than subsection (1), and

(b) the amount or value of any benefits received by the buyer directly or indirectly by reason of the contract.

(4) Where a seller has received payment in goods their reasonable value or the proceeds of their resale shall be treated as payments for the purposes of subsection (2); but if the seller has notice of the buyer's breach before reselling goods received in part performance, his resale is subject to the conditions laid down in this Article on resale by an aggrieved seller (Section 2-706).

§ 2-725. Statute of Limitations in Contracts for Sale.

(1) An action for breach of any contract for sale must be commenced within four years after the cause of action has accrued. By the original agreement the parties may reduce the period of limitation to not less than one year but may not extend it.

(2) A cause of action accrues when the breach occurs, regardless of the aggrieved party's lack of knowledge of the breach. A breach of warranty occurs when tender of delivery is made, except that where a warranty explicitly extends to future performance of the goods and discovery of the breach must await the time of such performance the cause of action accrues when the breach is or should have been discovered.

(3) Where an action commenced within the time limited by subsection (1) is so terminated as to leave available a remedy by another action for the same breach such other action may be commenced after the expiration of the time limited and within six months after the termination of the first action unless the termination resulted from voluntary discontinuance or from dismissal for failure or neglect to prosecute.

(4) This section does not alter the law on tolling of the statute of limitations nor does it apply to causes of action which have accrued before this Act becomes effective.

opening of a pipe, and, before it had been contaminated by fumes from the engine, some of the air which had passed through the engine's radiator and carried it back in the pipe through the small radiator into the car. While Muir had no small fan, he did get an air current by placing the flared opening of his leader pipe where the air would be blown into it by the fan at the rear of the engine radiator. Nor was this feature entirely new, as is shown by the British patent No. 9026 to Daimler in 1900.

Moreover, the use of a fan as a unit with a radiator to withdraw the heat faster by air circulation was old. As early as 1869, B. F. Sturtevant obtained patent No. 92,490, which showed that much though of course not in connection with an automobile heater. What Sturtevant, and some others who need not be named, did, is only mentioned to lead up to the Modine patent, No. 1,666,907, issued April 24, 1928, for a heating unit which so completely disclosed a small radiator integral with the housing through which air was forced by a fan that it is quite impossible to find more in Caesar's radiator as such, than a small Modine heating unit.

The claims relied upon may be illustrated by 3 and 13 which are quoted:

"3. A hot-liquid heating system for motor-driven vehicles comprising an engine circulating liquid-cooling system including an engine cooling-medium jacket and radiator, a valve positioned between the engine cooling-medium jacket and radiator for controlling the flow of the cooling-medium from the jacket to the radiator and its return, a liquid-heated air-heater positioned within the body of the vehicle and in communication with the engine circulating-liquid cooling system, means disposed between the liquid-heated air-heater and an engine-containing chamber to prevent passage of noxious gases and fumes from the engine-containing chamber into the space containing the liquid-heated air-heater, an electric motor-driven fan to circulate heated air within the vehicle body, and means for regulating the speed of the motor to control the circulation of air within the body of the vehicle."

"13. A hot liquid heating system for motor driven vehicles comprising an engine circulating liquid cooling system including an engine cooling medium jacket and radiator and means for producing a flow of the cooling medium from the jacket to the radiator and its return, a liquid heated air heater positioned within the body of the vehicle and in communication with the engine circulating liquid cooling system, means disposed between the liquid heated air heater and an engine containing chamber to prevent passage of noxious gases and fumes from the engine-containing chamber into the space containing the liquid-heated air-heater and a fan within the space containing the liquid-heated air-heater for circulating air in contact with said air heater and within the vehicle body."

That this heater was a good one may be taken for granted, but what more was needed to put it into an automobile ready for use in the approved manner of Caesar than a good mechanic to cut the pipes connecting a Faruolo radiator, or an Anderson radiator, or a Gulyban radiator at the dash, and attach them to a Modine unit placed just behind the dash, cannot be discovered. No part performs a new function in Caesar in connection with any other part. A well-advertised aggregation of devices taken from the prior art has had conspicuous commercial success, but that falls short of proof of invention needed to sustain a patent, however persuasive it may be on the question of utility. McClain v. Ortmayer, 141 U. S. 419, 12 S. Ct. 76, 35 L. Ed. 800. In our opinion, all the claims in suit are invalid on the grounds set forth at length in Tropic-Aire v. Sears, Roebuck & Co., supra.

Decree reversed.

JAMES BAIRD CO. v. GIMBEL BROS., Inc.
No. 330.

Circuit Court of Appeals, Second Circuit.
April 10, 1933.

1. Sales ⇐22(3).

Contractor's placing of successful bid for construction work, based, as to linoleum, upon prices quoted in merchant's offer of prices for "prompt acceptance after general contract has been awarded," *held* not to create binding contract to supply linoleum, where offer was withdrawn before contractor gave notice of acceptance.

The contractor's use of prices offered by the merchant for linoleum, in making bid on public construction work, which bid was accepted, did not create binding contract for purchase of linoleum, since contractor could have withdrawn bid and mere putting in of bid by contractor would not have rendered him liable to merchant.

in event of repudiation of construction contract, and since the offer provided, "If successful in being awarded this contract, it will be absolutely guaranteed, * * * and * * * we are offering these prices for reasonable * * * prompt acceptance after the general contract has been awarded."

2. Sales ⇐22(2).

Merchant who withdrew offer to contractor of prices for linoleum, after contractor had made bid on basis of prices offered, but before communication of acceptance, *held* not liable in damages under doctrine of "promissory estoppel."

3. Sales ⇐22(1).

Merchant's offer to contractor of linoleum at specified prices for prompt acceptance after construction contract should be awarded, *held* not to give contractor option to accept linoleum at quoted prices if bid was successful.

Appeal from the District Court of the United States for the Southern District of New York.

Action by the James Baird Company against Gimbel Brothers, Incorporated. From a judgment dismissing the complaint, plaintiff appeals.

Affirmed.

Campbell, Harding, Goodwin & Danforth, of New York City (Garrard Glenn and William L. Glenn, both of New York City, of counsel), for appellant.

Chadbourne, Stanchfield & Levy, of New York City (Leonard P. Moore and David S. Hecht, both of New York City, of counsel), for appellee.

Before MANTON L. HAND, and SWAN, Circuit Judges.

L. HAND, Circuit Judge.

The plaintiff sued the defendant for breach of a contract to deliver linoleum under a contract of sale; the defendant denied the making of the contract; the parties tried the case to the judge under a written stipulation and he directed judgment for the defendant. The facts as found, bearing on the making of the contract, the only issue necessary to discuss, were as follows: The defendant, a New York merchant, knew that the Department of Highways in Pennsylvania had asked for bids for the construction of a public building. It sent an employee to the office of a contractor in Philadelphia, who had possession of the specifications, and the employee there computed the amount of the linoleum which would be required on the job, underestimating the total yardage by about one-half the proper amount. In ignorance of this mistake, on December twenty-fourth the defendant sent to some twenty or thirty contractors, likely to bid on the job, an offer to supply all the linoleum required by the specifications at two different lump sums, depending upon the quality used. These offers concluded as follows: "If successful in being awarded this contract, it will be absolutely guaranteed, * * * and * * * we are offering these prices for reasonable" (sic), "prompt acceptance after the general contract has been awarded." The plaintiff, a contractor in Washington, got one of these on the twenty-eighth, and on the same day the defendant learned its mistake and telegraphed all the contractors to whom it had sent the offer, that it withdrew it and would substitute a new one at about double the amount of the old. This withdrawal reached the plaintiff at Washington on the afternoon of the same day, but not until after it had put in a bid at Harrisburg at a lump sum, based as to linoleum upon the prices quoted by the defendant. The public authorities accepted the plaintiff's bid on December thirtieth, the defendant having meanwhile written a letter of confirmation of its withdrawal, received on the thirty-first. The plaintiff formally accepted the offer on January second, and, as the defendant persisted in declining to recognize the existence of a contract, sued it for damages on a breach.

[1] Unless there are circumstances to take it out of the ordinary doctrine, since the offer was withdrawn before it was accepted, the acceptance was too late. Restatement of Contracts, § 35. To meet this the plaintiff argues as follows: It was a reasonable implication from the defendant's offer that it should be irrevocable in case the plaintiff acted upon it, that is to say, used the prices quoted in making its bid, thus putting itself in a position from which it could not withdraw without great loss. While it might have withdrawn its bid after receiving the revocation, the time had passed to submit another, and as the item of linoleum was a very trifling part of the cost of the whole building, it would have been an unreasonable hardship to expect it to lose the contract on that account, and probably forfeit its deposit. While it is true that the plaintiff might in advance have secured a contract conditional upon the success of its bid, this was not what the defendant suggested. It understood that

the contractors would use its offer in their bids, and would thus in fact commit themselves to supplying the linoleum at the proposed prices. The inevitable implication from all this was that when the contractors acted upon it, they accepted the offer and promised to pay for the linoleum, in case their bid were accepted.

It was of course possible for the parties to make such a contract, and the question is merely as to what they meant; that is, what is to be imputed to the words they used. Whatever plausibility there is in the argument, is in the fact that the defendant must have known the predicament in which the contractors would be put if it withdrew its offer after the bids went in. However, it seems entirely clear that the contractors did not suppose that they accepted the offer merely by putting in their bids. If, for example, the successful one had repudiated the contract with the public authorities after it had been awarded to him, certainly the defendant could not have sued him for a breach. If he had become bankrupt, the defendant could not prove against his estate. It seems plain therefore that there was no contract between them. And if there be any doubt as to this, the language of the offer sets it at rest. The phrase, "if successful in being awarded this contract," is scarcely met by the mere use of the prices in the bids. Surely such a use was not an "award" of the contract to the defendant. Again, the phrase, "we are offering these prices for * * * prompt acceptance after the general contract has been awarded," looks to the usual communication of an acceptance, and precludes the idea that the use of the offer in the bidding shall be the equivalent. It may indeed be argued that this last language contemplated no more than an early notice that the offer had been accepted, the actual acceptance being the bid, but that would wrench its natural meaning too far, especially in the light of the preceding phrase. The contractors had a ready escape from their difficulty by insisting upon a contract before they used the figures; and in commercial transactions it does not in the end promote justice to seek strained interpretations in aid of those who do not protect themselves.

[2] But the plaintiff says that even though no bilateral contract was made, the defendant should be held under the doctrine of "promissory estoppel." This is to be chiefly found in those cases where persons subscribe to a venture, usually charitable, and are held to their promises after it has been completed. It has been applied much more broadly, however, and has now been generalized in section 90, of the Restatement of Contracts. We may arguendo accept it as it there reads, for it does not apply to the case at bar. Offers are ordinarily made in exchange for a consideration, either a counter-promise or some other act which the promisor wishes to secure. In such cases they propose bargains; they presuppose that each promise or performance is an inducement to the other. Wisconsin, etc., Ry. v. Powers, 191 U. S. 379, 386, 387, 24 S. Ct. 107, 48 L. Ed. 229; Banning Co. v. California, 240 U. S. 142, 152, 153, 36 S. Ct. 338, 60 L. Ed. 569. But a man may make a promise without expecting an equivalent; a donative promise, conditional or absolute. The common law provided for such by sealed instruments, and it is unfortunate that these are no longer generally available. The doctrine of "promissory estoppel" is to avoid the harsh results of allowing the promisor in such a case to repudiate, when the promisee has acted in reliance upon the promise. Siegel v. Spear & Co., 234 N. Y. 479, 138 N. E. 414, 26 A. L. R. 1205. Cf. Allegheny College v. National Bank, 246 N. Y. 369, 159 N. E. 173, 57 L. R. A. 980. But an offer for an exchange is not meant to become a promise until a consideration has been received, either a counter-promise or whatever else is stipulated. To extend it would be to hold the offeror regardless of the stipulated condition of his offer. In the case at bar the defendant offered to deliver the linoleum in exchange for the plaintiff's acceptance, not for its bid, which was a matter of indifference to it. That offer could become a promise to deliver only when the equivalent was received; that is, when the plaintiff promised to take and pay for it. There is no room in such a situation for the doctrine of "promissory estoppel."

[3] Nor can the offer be regarded as of an option, giving the plaintiff the right seasonably to accept the linoleum at the quoted prices if its bid was accepted, but not binding it to take and pay, if it could get a better bargain elsewhere. There is not the least reason to suppose that the defendant meant to subject itself to such a one-sided obligation. True, if so construed, the doctrine of "promissory estoppel" might apply, the plaintiff having acted in reliance upon it, though, so far as we have found, the decisions are otherwise. Ganss v. Guffey Petroleum Co., 125 App. Div. 760, 110 N. Y. S. 176; Comstock v. North, 88 Miss. 754, 41 So. 374. As to that, however, we need not declare ourselves.

Judgment affirmed.

William A. DRENNAN, Respondent,
v.
STAR PAVING COMPANY (a Corporation), Appellant.
L. A. 25024.

Supreme Court of California.
In Bank.
Dec. 31, 1958.

General contractor brought action against paving subcontractor to recover damages because of refusal of subcontractor to perform paving according to bid which subcontractor submitted to general contractor. The Superior Court, Kern County, William L. Bradshaw, J., entered judgment adverse to the subcontractor, and the subcontractor appealed. The Supreme Court, Traynor, J., held that where paving subcontractor submitted bid for paving work to general contractor, and bid was silent with respect to right of paving subcontractor to revoke the bid, and general contractor used the bid in making its own successful bid on the main contract, general contractor's reliance on paving subcontractor's bid made the bid irrevocable, and that fact that subcontractor's bid was result of mistake was no defense.

Affirmed.

Opinion, 323 P.2d 477 vacated.

1. Contracts ⇐1
Where there was no evidence that subcontractor offered to make its paving bid, which it submitted to general contractor, irrevocable in exchange for use of its figures by general contractor in computing his bid, and there was no evidence that would warrant interpreting general contractor's use of subcontractor's bid as the acceptance thereof, binding general contractor, on condition that general contractor receive the main contract, to award paving subcontract to paving contractor, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

2. Estoppel ⇐85
Promise which promisor should reasonably expect to induce action or forbearance of a definite and substantial character on part of promisee, and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise.

3. Contracts ⇐218
Submission of paving bid to general contractor by subcontractor constituted a promise to perform on such conditions as were stated expressly or by implication in the bid or were annexed thereto by operation of law.

4. Contracts ⇐218
If offer for unilateral contract is made, and part of consideration requested in the offer is given or tendered by offeree in response thereto, offeror is bound by a contract, the duty of immediate performance of which is conditional on full consideration being given or tendered within time stated in offer, or, if no time is stated therein, within a reasonable time.

5. Contracts ⇐19
Reasonable reliance resulting in foreseeable prejudicial change in position affords a compelling basis for implying a subsidiary promise not to revoke an offer for a bilateral contract.

6. Contracts ⇐85
Absence of consideration is not fatal to enforcement of implied subsidiary promise not to revoke an offer for a bilateral contract.

7. Contracts ⇐19
Where paving subcontractor submitted bid for paving work to general contractor, and bid was silent with respect to right of paving subcontractor to revoke the bid, and general contractor used the bid in making its own successful bid on the main contract, general contractor's reliance on paving subcontractor's bid made the bid irrevocable.

8. Contracts ⇐21
General contractor cannot reopen bargaining with subcontractor and at same time claim a continuing right to accept the original offer of subcontractor.

9. Contracts ⇐93(1)

If general contractor had reason to believe that paving contractor's bid was in error, general contractor could not justifiably rely on the bid in making the general contractor's main bid.

10. Contracts ⇐93(1)

Where paving subcontractor submitted bid for paving work to general contractor, and bid was silent with respect to right of paving subcontractor to revoke the bid, and general contractor used the bid in making its own successful bid on the main contract, fact that bid of paving subcontractor was result of mistake would not relieve paving subcontractor from its obligation.

11. Damages ⇐155

In action by general contractor against paving subcontractor to recover damages caused by subcontractor's refusal to perform paving work according to bid of $7,131.60 submitted by subcontractor to general contractor, allegation of complaint that after subcontractor's default, general contractor was forced to procure services of third party to perform paving for $10,948.60 sufficiently alleged attempt by general contractor to mitigate damages.

12. Pleading ⇐406(7)

Where question of alleged uncertainty in allegation in complaint as to damages was not raised by special demurrer, question was waived by defendant. West's Ann.Code Civ.Proc. §§ 430, subd. 9, 434.

Atus P. Reuther, Norman Soibelman, Los Angeles, Obegi & High and Earl J. McDowell, Van Nuys, for appellant.

S. B. Gill, Bakersfield, for respondent.

TRAYNOR, Justice.

Defendant appeals from a judgment for plaintiff in an action to recover damages caused by defendant's refusal to perform certain paving work according to a bid it submitted to plaintiff.

On July 28, 1955, plaintiff, a licensed general contractor, was preparing a bid on the "Monte Vista School Job" in the Lancaster school district. Bids had to be submitted before 8:00 p. m. Plaintiff testified that it was customary in that area for general contractors to receive the bids of subcontractors by telephone on the day set for bidding and to rely on them in computing their own bids. Thus on that day plaintiff's secretary, Mrs. Johnson, received by telephone between fifty and seventy-five subcontractors' bids for various parts of the school job. As each bid came in, she wrote it on a special form, which she brought into plaintiff's office. He then posted it on a master cost sheet setting forth the names and bids of all subcontractors. His own bid had to include the names of subcontractors who were to perform one-half of one per cent or more of the construction work, and he had also to provide a bidder's bond of ten per cent of his total bid of $317,385 as a guarantee that he would enter the contract if awarded the work.

Late in the afternoon, Mrs. Johnson had a telephone conversation with Kenneth R. Hoon, an estimator for defendant. He gave his name and telephone number and stated that he was bidding for defendant for the paving work at the Monte Vista School according to plans and specifications and that his bid was $7,131.60. At Mrs. Johnson's request he repeated his bid. Plaintiff listened to the bid over an extension telephone in his office and posted it on the master sheet after receiving the bid form from Mrs. Johnson. Defendant's was the lowest bid for the paving. Plaintiff computed his own bid accordingly and submitted it with the name of defendant as the subcontractor for the paving. When the bids were opened on July 28th, plaintiff's proved to be the lowest, and he was awarded the contract.

On his way to Los Angeles the next morning plaintiff stopped at defendant's office. The first person he met was defendant's construction engineer, Mr. Oppenheimer. Plaintiff testified: "I introduced myself and he immediately told me that they had made a mistake in their bid to me the night before, they couldn't do it for

the price they had bid, and I told him I would expect him to carry through with their original bid because I had used it in compiling my bid and the job was being awarded them. And I would have to go and do the job according to my bid and I would expect them to do the same."

Defendant refused to do the paving work for less than $15,000. Plaintiff testified that he "got figures from other people" and after trying for several months to get as low a bid as possible engaged L & H Paving Company, a firm in Lancaster, to do the work for $10,948.60.

The trial court found on substantial evidence that defendant made a definite offer to do the paving on the Monte Vista job according to the plans and specifications for $7,131.60, and that plaintiff relied on defendant's bid in computing his own bid for the school job and naming defendant therein as the subcontractor for the paving work. Accordingly, it entered judgment for plaintiff in the amount of $3,817.00 (the difference between defendant's bid and the cost of the paving to plaintiff) plus costs.

Defendant contends that there was no enforceable contract between the parties on the ground that it made a revocable offer and revoked it before plaintiff communicated his acceptance to defendant.

[1] There is no evidence that defendant offered to make its bid irrevocable in exchange for plaintiff's use of its figures in computing his bid. Nor is there evidence that would warrant interpreting plaintiff's use of defendant's bid as the acceptance thereof, binding plaintiff, on condition he received the main contract, to award the subcontract to defendant. In sum, there was neither an option supported by consideration nor a bilateral contract binding on both parties.

Plaintiff contends, however, that he relied to his detriment on defendant's offer and that defendant must therefore answer in damages for its refusal to perform. Thus the question is squarely presented: Did plaintiff's reliance make defendant's offer irrevocable?

[2] Section 90 of the Restatement of Contracts states: "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." This rule applies in this state. Edmonds v. County of Los Angeles, 40 Cal.2d 642, 255 P.2d 772; Frebank Co. v. White, 152 Cal.App.2d 522, 313 P.2d 633; Wade v. Markwell & Co., 118 Cal.App.2d 410, 258 P.2d 497, 37 A.L.R.2d 1363; West v. Hunt Foods Co., 101 Cal.App.2d 597, 225 P.2d 978; Hunter v. Sparling, 87 Cal.App.2d 711, 197 P.2d 807; see 18 Cal.Jur.2d 407–408; 5 Stan.L.Rev. 783.

[3] Defendant's offer constituted a promise to perform on such conditions as were stated expressly or by implication therein or annexed thereto by operation of law. (See 1 Williston, Contracts [3rd. ed.], § 24A, p. 56, § 61, p. 196.) Defendant had reason to expect that if its bid proved the lowest it would be used by plaintiff. It induced "action * * * of a definite and substantial character on the part of the promisee."

[4] Had defendant's bid expressly stated or clearly implied that it was revocable at any time before acceptance we would treat it accordingly. It was silent on revocation, however, and we must therefore determine whether there are conditions to the right of revocation imposed by law or reasonably inferable in fact. In the analogous problem of an offer for a unilateral contract, the theory is now obsolete that the offer is revocable at any time before complete performance. Thus section 45 of the Restatement of Contracts provides: "If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein,

within a reasonable time." In explanation, comment *b* states that the "main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted. Part performance or tender may thus furnish consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as sufficient reason for making a promise binding (see § 90)."

[5] Whether implied in fact or law, the subsidiary promise serves to preclude the injustice that would result if the offer could be revoked after the offeree had acted in detrimental reliance thereon. Reasonable reliance resulting in a foreseeable prejudicial change in position affords a compelling basis also for implying a subsidiary promise not to revoke an offer for a bilateral contract.

[6] The absence of consideration is not fatal to the enforcement of such a promise. It is true that in the case of unilateral contracts the Restatement finds consideration for the implied subsidiary promise in the part performance of the bargained-for exchange, but its reference to section 90 makes clear that consideration for such a promise is not always necessary. The very purpose of section 90 is to make a promise binding even though there was no consideration "in the sense of something that is bargained for and given in exchange." (See 1 Corbin, Contracts 634 et seq.) Reasonable reliance serves to hold the offeror in lieu of the consideration ordinarily required to make the offer binding. In a case involving similar facts the Supreme Court of South Dakota stated that "we believe that reason and justice demand that the doctrine [of section 90] be applied to the present facts. We cannot believe that by accepting this doctrine as controlling in the state of facts before us we will abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application. We are of the opinion, therefore, that the defendants in executing the agreement [which was not supported by consideration] made a promise which they should have reasonably expected would induce the plaintiff to submit a bid based thereon to the Government, that such promise did induce this action, and that injustice can be avoided only by enforcement of the promise." Northwestern Engineering Co. v. Ellerman, 69 S.D. 397, 408, 10 N.W.2d 879, 884; see also, Robert Gordon, Inc., v. Ingersoll-Rand Co., 7 Cir., 117 F.2d 654, 661; cf. James Baird Co. v. Gimbel Bros., 2 Cir., 64 F.2d 344.

[7] When plaintiff used defendant's offer in computing his own bid, he bound himself to perform in reliance on defendant's terms. Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. It was bound to realize the substantial possibility that its bid would be the lowest, and that it would be included by plaintiff in his bid. It was to its own interest that the contractor be awarded the general contract; the lower the subcontract bid, the lower the general contractor's bid was likely to be and the greater its chance of acceptance and hence the greater defendant's chance of getting the paving subcontract. Defendant had reason not only to expect plaintiff to rely on its bid but to want him to. Clearly defendant had a stake in plaintiff's reliance on its bid. Given this interest and the fact that plaintiff is bound by his own bid, it is only fair that plaintiff should have at least an opportunity to accept defendant's bid after the general contract has been awarded to him.

[8] It bears noting that a general contractor is not free to delay acceptance after he has been awarded the general contract in the hope of getting a better price. Nor can he reopen bargaining with the subcontractor and at the same time claim a continuing right to accept the original offer. See, R. J. Daum Const. Co. v. Child, Utah, 247 P.2d 817, 823. In the present case plaintiff promptly informed defendant that plaintiff was being awarded the job and that the subcontract was being awarded to defendant.

[9, 10] Defendant contends, however, that its bid was the result of mistake and that it was therefore entitled to revoke it. It relies on the rescission cases of M. F. Kemper Const. Co. v. City of Los Angeles, 37 Cal.2d 696, 235 P.2d 7, and Brunzell Const. Co. v. G. J. Weisbrod, Inc., 134 Cal. App.2d 278, 285 P.2d 989. See also, Lemoge Electric v. San Mateo County, 46 Cal.2d 659, 662, 297 P.2d 638. In those cases, however, the bidder's mistake was known or should have been known to the offeree, and the offeree could be placed in status quo. Of course, if plaintiff had reason to believe that defendant's bid was in error, he could not justifiably rely on it, and section 90 would afford no basis for enforcing it. Robert Gordon, Inc., v. Ingersoll-Rand, Inc., 7 Cir., 117 F.2d 654, 660. Plaintiff, however, had no reason to know that defendant had made a mistake in submitting its bid, since there was usually a variance of 160 per cent between the highest and lowest bids for paving in the desert around Lancaster. He committed himself to performing the main contract in reliance on defendant's figures. Under these circumstances defendant's mistake, far from relieving it of its obligation, constitutes an additional reason for enforcing it, for it misled plaintiff as to the cost of doing the paving. Even had it been clearly understood that defendant's offer was revocable until accepted, it would not necessarily follow that defendant had no duty to exercise reasonable care in preparing its bid. It presented its bid with knowledge of the substantial possibility that it would be used by plaintiff; it could foresee the harm that would ensue from an erroneous underestimate of the cost. Moreover, it was motivated by its own business interest. Whether or not these considerations alone would justify recovery for negligence had the case been tried on that theory (see Biakanja v. Irving, 49 Cal.2d 647, 650, 320 P.2d 16), they are persuasive that defendant's mistake should not defeat recovery under the rule of section 90 of the Restatement of Contracts. As between the subcontractor who made the bid and the general contractor who reasonably relied on it, the loss resulting from the mistake should fall on the party who caused it.

Leo F. Piazza Paving Co. v. Bebek & Brkich, 141 Cal.App.2d 226, 296 P.2d 368, 371, and Bard v. Kent, 19 Cal.2d 449, 122 P. 2d 8, 139 A.L.R. 1032, are not to the contrary. In the Piazza case the court sustained a finding that defendants intended, not to make a firm bid, but only to give the plaintiff "some kind of an idea to use" in making its bid; there was evidence that the defendants had told plaintiff they were unsure of the significance of the specifications. There was thus no offer, promise, or representation on which the defendants should reasonably have expected the plaintiff to rely. The Bard case held that an option not supported by consideration was revoked by the death of the optionor. The issue of recovery under the rule of section 90 was not pleaded at the trial, and it does not appear that the offeree's reliance was "of a definite and substantial character" so that injustice could be avoided "only by the enforcement of the promise."

[11, 12] There is no merit in defendant's contention that plaintiff failed to state a cause of action, on the ground that the complaint failed to allege that plaintiff attempted to mitigate the damages or that they could not have been mitigated. Plaintiff alleged that after defendant's default, "plaintiff had to procur the services of the L & H Co. to perform said asphaltic paving for the sum of $10,948.60." Plaintiff's uncontradicted evidence showed that he spent several months trying to get bids from other subcontractors and that he took the lowest bid. Clearly he acted reasonably to mitigate damages. In any event any uncertainty in plaintiff's allegation as to damages could have been raised by special demurrer. Code Civ.Proc. § 430, subd. 9. It was not so raised and was therefore waived. Code Civ.Proc. § 434.

The judgment is affirmed.

GIBSON C. J., and SHENK, SCHAUER, SPENCE and McCOMB, JJ., concur.

While *Lemke* concerned the meaning that the parties gave to a word in a contract already formed, the same reasoning would apply where, as here, it cannot be determined either from the document itself or the affidavits in support of the motion that the words used in the document did not represent on the part of the defendant an express intent not to enter into any binding contract until its subsequent approval of a formal writing which both parties agreed would be forthcoming.

[4] A trial court's refusal to grant summary judgment is to be reversed only if there has been a clear abuse of discretion. Schultz v. Tobin (1970), 47 Wis.2d 230, 177 N.W.2d 128. We conclude that in the instant case the trial court did not abuse its discretion in denying plaintiff's motion for summary judgment.

Order affirmed.

58 Wis.2d 193

AIR PRODUCTS AND CHEMICALS, INC., Plaintiff-Respondent,

v.

FAIRBANKS MORSE, INC., Defendant-Appellant,

Hartford Steam Boiler Inspection and Insurance Co., Intervener-Respondent.

No. 364.

Supreme Court of Wisconsin.

April 20, 1973.

Rehearing Denied June 29, 1973.

Buyer of large electric motors brought action, in which its insurer intervened, against manufacturer of such motors sounding in negligence, strict liability, breach of implied warranties of merchantability and fitness for particular purposes and breach of contract. The Circuit Court, Rock County, Richard W. Orton, J., sustained certain demurrers and overruled others, and parties appealed. The Supreme Court, Hanley, J., held that Wisconsin six-year statute of limitations for contract actions rather than Pennsylvania four-year statute for breach of contract action was applicable to action brought by corporation, which had its principal business and engineering offices in Pennsylvania, against seller which manufactured such motors in Wisconsin, in that application of Wisconsin statute would not affect any legitimate interest of Pennsylvania because statutes of limitation were designed to protect defendants and Pennsylvania resident was plaintiff. The Court further held that under Pennsylvania law, provision within seller's "acknowledgment of order" that seller "nowise assumes any responsibility or liability with respect to use, purpose, or suitability, and shall not be liable for damages of any character, whether direct or consequential, for defect, delay, or otherwise, its sole liability and obligation being confined to the replacement in the manner aforesaid or defectively manufactured guaranteed parts failing within the time stated" was sufficiently material to require express conversation between buyer and seller over its inclusion or exclusion in contract; thus, absent express agreement to such provision by buyer, provision did not become a part of the contract.

Affirmed in part; reversed in part.

1. Action ⇐17

Choice of law in case before Supreme Court is matter to be decided on basis of existing conflicts rules of such court.

2. Action ⇐17

Though predictability of results, maintenance of interstate and international order, simplification of the judicial task, advancement of the forum's governmental interests and application of the better rule of law are considerations which should all be given due consideration in ultimate outcome of any choice of law question, mere

counting of such considerations should not be engaged in, but rather court should look to relevancy of particular consideration in terms of policies which forum deems important, vis-a-vis, other contact states.

3. Action ⇐17

Most important factors to be considered in determining choice of law question are maintenance of interstate and international order and advancement of the forum's governmental interests.

4. Limitation of Actions ⇐1

Underlying purpose in enactment of a statute of limitations is protection of defendants and courts from stale claims springing up at great distances of time and surprising all witnesses when all evidence has become obscure.

5. Limitation of Actions ⇐2(2)

Wisconsin six-year statute of limitations for contract actions rather than Pennsylvania four-year statute of limitations for breach of contract actions was applicable to action brought by corporation, which bought large electric motors in question and which had its principal business and engineering offices in Pennsylvania, and its insurer against seller which manufactured such motors in Wisconsin, in that application of Wisconsin statute would not affect any legitimate interest of Pennsylvania because statutes of limitation were designed to protect defendants and Pennsylvania resident was plaintiff. 12A P.S. Pa. §§ 1–101 et seq., 2–925.

6. Sales ⇐420

Purchase order which provided for assessment of liquidated damages in case of failure by seller to make delivery of equipment conforming to specifications within time set forth in delivery schedule and which provided that right to recover liquidated damages as specified in attached schedule "shall be in addition to any and all other remedies of the buyer" was inconsistent and ambiguous; thus, whether buyer would be entitled to recover its full and actual damages from seller or whether its recovery would be limited to liquidated damages established in contract was question of fact not determinable as matter of law.

7. Sales ⇐418(6)

Under Pennsylvania law, provision within seller's "acknowledgment of order" that seller "nowise assumes any responsibility or liability with respect to use, purpose, or suitability, and shall not be liable for damages of any character, whether direct or consequential, for defect, delay or otherwise, its sole liability and obligation being confined to the replacement in the manner aforesaid or defectively manufactured guaranteed parts failing within the time stated" was sufficient material to require express conversation over its inclusion or exclusion in contract; thus, absent express agreement to such provision by buyer, provision did not become a part of the contract. 12A P.S.Pa. §§ 2–207, 2–207(1–3), (2)(a, b), 2–314, 2–315, 2–714, 2–714(2, 3), 2–715, 2–715(2)(a).

8. Products Liability ⇐73

Complaint alleging in effect that large electric motors, which were manufactured by defendant and sold to plaintiff, contained unreasonably defective parts which were unreasonably dangerous to other parts of motors and which caused injury to motors and economic loss stated cause of action for strict liability under Pennsylvania law.

Actions commenced by plaintiff-respondent, Air Products and Chemicals, Inc. (hereinafter, "Air Products") and Air Products' insurer, Intervener-Respondent, The Hartford Steam Boiler Inspection and Insurance Co., (hereinafter, "Hartford") against Defendant-Appellant, Fairbanks Morse, Inc., (hereinafter, "Fairbanks") alleging various causes of action sounding in negligence, strict liability, breach of implied warranties of merchantability and fit-

ness for particular purposes and breach of contract.

The facts upon which this case is based are gathered from the very extensive pleadings filed by all parties.

Air Products is a Delaware corporation with its principal business and engineering offices in Allentown, Pennsylvania. It is engaged in the business of producing industrial gas and other products, operating plants throughout the United States. Air Products designs, engineers and constructs its own industrial gas plants and for such plants purchases component parts from a large number of suppliers located throughout the United States. All of Air Products engineering and design personnel and all of its personnel engaged in the specification and purchase of components for all of its plants are located at its offices in Allentown, Pennsylvania.

Fairbanks is a Delaware corporation with its principal offices in New York, New York. It, too, has manufacturing plants in several states and has a factory in Beloit, Wisconsin which manufactured the electric motors which are the subject of this action.

Hartford is a Connecticut corporation with its principal office in Hartford, Connecticut. Its involvement in this action arises from payments it has made to Air Products pursuant to a contract of insurance, which payments reimbursed Air Products for some of the alleged damages sustained.

The subject matter of this action is approximately ten large electric motors ranging in horsepower from 800 to 17,000 which Air Products purchased from Fairbanks in 1964. Air Products and Hartford allege that six of these motors failed to perform satisfactorily causing them to sustain substantial damages.

In or about March or early April, 1964, Fairbanks received from Air Products detailed specifications for the 800, 5,000, 6,000 and 11,000 horsepower motors which are described in plaintiff's complaint, as well as a group of other motors and was invited to submit its proposal to Air Products for the manufacture and sale of such motors. In late March and April, 1964, Fairbanks' sales agent whose offices were in Philadelphia, submitted proposals on Fairbanks' behalf in response to Air Products' invitation for quotations. On or about April 15, 1964 at a conference, Fairbanks' representatives were told by Air Products' agents that its proposal had been accepted and that Air Products would purchase the 11,000 and 6,000 horsepower motors and a second 6,000 horsepower motor pursuant to Fairbanks' quotations as they had been clarified and revised in the conference. On April 21, 1964, Air Products issued its purchase order confirming its verbal order of April 15, 1964. On April 30, 1964, Fairbanks returned an executed copy of Air Products' purchase order together with Fairbanks' acknowledgment of order form.

In or about July or August of 1964, a similar procedure was followed which culminated in Air Products purchasing another group of motors including the 17,000 horsepower motor in suit.

In October, a similar procedure was followed when Air Products exercised the option that had been previously granted to it in April to purchase 5,000 and 800 horsepower motors, as well as the second 6,000 horsepower motor. The option was confirmed by the issuance of purchase orders which were acknowledged by Fairbanks.

All of the motors were manufactured at Fairbanks' plant in Beloit, Wisconsin. The 11,000 and two 6,000 horsepower motors were shipped to Air Products' plant in Michoud, Louisiana on, respectively, March 20, April 13, and May 29, 1965. The 5,000 and 800 horsepower motors were shipped to Air Products' plant in Delaware City, Delaware in July, 1965. The 17,000 horsepower motor was shipped to Air Products' plant in Sparrow's Point, New Jersey in September, 1965. Each of the motors'

function was to drive large compressors. The motors were not coupled to the compressors and tested in Beloit but were coupled to their respective compressors at the various plants to where they were shipped.

Air Products commenced its action against Fairbanks on May 8, 1969. Hartford commenced its action against Fairbanks December 1, 1970. Air Products' complaint sets forth forty-three causes of action. Hartford's complaint is of similar import.

As to all but a few of the causes of action pleaded by both Air Products (all but causes of action 33–36 and 43) and Hartford, (all but causes of action 15–18 and 22) Fairbanks set up as an affirmative defense the four-year Pennsylvania statute of limitations, 12A Pennsylvania Statutes, sec. 2–725. In its reply, both Air Products and Hartford demurred to these affirmative defenses on the grounds that they failed to state a defense and the trial court sustained these demurrers. Fairbanks has appealed.

As an affirmative defense, (Eleventh Affirmative Defense) to Hartford's first through fifth causes of action and nineteenth causes of action and as an affirmative defense (Thirteenth Affirmative Defense) to Air Products first through sixth, seventh through twelfth, twenty-second through twenty-seventh, thirty-eighth and forty-first causes of action, Fairbanks set forth a provision contained in Air Products' original purchase order relating to liquidated damages for certain of the motors and alleges that since Air Products has already been given credit for these liquidated damages, these causes of action should be dismissed on their merits. As to these affirmative defenses, both Air Products and Hartford demurred. The trial court overruled their demurrers. From the order overruling their demurrers, Air Products and Hartford have appealed.

As an affirmative defense (Eight Affirmative Defense) to all of Air Products' causes of action, and as an affirmative defense (Fifth Affirmative Defense) to all of Hartford's causes of action, Fairbanks set up a provision contained in its "Acknowledgments of Order" which were sent by Fairbanks to Air Products, along with an executed purchase order on each of the motors and which it is alleged, limits the liability of Fairbanks to Air Products. To each of these affirmative defenses, both Hartford and Air Products demurred. The trial court overruled their demurrers. From the order overruling their demurrers, Air Products and Hartford have appealed.

The fourth, tenth, sixteenth, twenty-first, twenty-fifth, thirty-first and thirty-sixth causes of action of Air Products' amended complaint and the fourth, ninth, fourteenth and eighteenth causes of action of Hartford's complaint alleged causes of action sounding in strict liability. As to each of these causes of action, Fairbanks demurred on the grounds that they did not state facts sufficient to constitute a cause of action for strict liability and the trial court sustained its demurrers. Later, Air Products amended its fourth, tenth and twenty-first causes of action and Hartford amended its fourth and fourteenth causes of action to include allegations that the motor described in a particular cause of action was unreasonably dangerous to those parts or portions of the motor which did not contain the defect. Fairbanks again demurred to the amended complaints on the ground that they did not state facts sufficient to constitute causes of action for strict liability and again the trial court sustained their demurrers. Air Products and Hartford appeal from the orders sustaining these demurrers.

Foley & Lardner, David E. Beckwith, Maurice J. McSweeney, John R. Dawson, Milwaukee, for defendant-appellant.

Quarles, Harriott, Clemons, Teschner & Noelke, L. C. Hammond, Jr., Ross R. Kinney, Milwaukee, for respondents.

HANLEY, Justice.

Four issues are presented on this appeal:

1. Is the four-year Pennsylvania Statute of Limitations a defense to any or all of Air Products' or Hartford's causes of action;

2. Can a contract which states that liquidated damages "shall be in addition to any and all other remedies of buyer" be interpreted to mean that liquidated damages is the buyer's sole and exclusive remedy;

3. Under Pennsylvania law can limitation of liability provisions contained in the seller's "acknowledgments of order" become terms in the contracts of sale when the buyer's purchase orders contained no such terms and the buyer never expressly agreed to such terms;

4. Under Pennsylvania law, is the tort doctrine of strict liability applicable to either economic losses caused by unreasonably defective products or products which are unreasonably dangerous to themselves which in fact injure themselves and cause economic losses?

Applicable Statute of Limitations

As an affirmative defense pleaded in its answer, Fairbanks set up Pennsylvania's four-year statute of limitations governing breaches of contract. The conflict arises because Wisconsin's statute of limitations in contract actions is six years. All parties agree that the remaining three issues must be resolved under Pennsylvania law.

[1] In sustaining the demurrers of Air Products and Hartford to the statute of limitations affirmative defense of Fairbanks, the trial court concluded that each state must determine for itself the period of time in which a suit for a particular claim can be brought; and that the "center of gravity" approach to conflicts questions which was originally adopted by this court in Wilcox v. Wilcox (1964), 26 Wis.2d 617, 133 N.W.2d 408 is too unpredictable to be used when the fundamental question of the appropriate statute of limitations is at issue. We agree with the trial court's ruling on the statute of limitations issue. However, we think the choice of law is a matter to be decided on the basis of the existing conflicts rules of this court.

In the case of Wilcox v. Wilcox, *supra*, this court broke new ground in the choice of law area by abandoning the very mechanical *lex loci* rule in matters involving the appropriate torts law to be applied when that of Wisconsin's is in conflict with one or more other interested jurisdictions. Following *Wilcox*, in the case of Heath v. Zellmer (1967), 35 Wis.2d 578, 151 N.W.2d 664, the rationale of *Wilcox* was refined such that when ". . . faced with a choice-of-law decision, this court should base its conclusions upon the following choice-influencing considerations . . .

"Predictability of results

"Maintenance of interstate and international order

"Simplification of the judicial task

"Advancement of the forum's governmental interests

"Application of the better rule of law." *Heath, supra*, 35 Wis.2d at page 596, 151 N.W.2d at page 672.

Although the court put no limits on the scope of what has come to be known as the "center-of-gravity" or "grouping-of-contacts" approach, a few short years later in Urhammer v. Olson (1968), 39 Wis.2d 447, 159 N.W.2d 688, it specifically and again with very broad language, extended it to contract cases. At page 450, 159 N.W.2d at page 689, the court stated:

"We now adopt the grouping-of-contacts approach for the resolution of conflicts questions pertaining to the validity and rights created by the provisions of a disputed contract."

Since the decision in *Urhammer*, the court has used the "grouping-of-contracts"

approach in Haines v. Mid-Century Ins. Co. (1970), 47 Wis.2d 442, 177 N.W.2d 328, another contracts case.

In the very recent case of Hunker v. Royal Indemnity Co. (1973), Wis., 204 N. W.2d 897, this court set forth with clarity the approach which we will follow in choice of law questions relating to tort and we reaffirm that approach in the case at bar.

[2-4] Although the five choice considerations stated above should all be given due consideration in the ultimate outcome of any choice of law question, this court should not engage in a mere "counting of these considerations" but rather look to the "relevancy" of the particular consideration in terms of the policies which the forum deems important, vis-a-vis, other contact states. *Wilcox, supra,* 26 Wis.2d at page 633, 133 N.W.2d 408.

Regardless of the fact that it would be difficult to underestimate the importance of "predictability" as it relates to this case, it appears that when the policy behind statutes of limitations is examined, the most important are the second and fourth considerations: "Maintenance of Interstate and International Order; and Advancement of the Forum's Governmental Interests."

There can be no question but that the underlying purpose in the enactment of a statute of limitations is to protect defendants and the courts from ". . . stale claims springing up at great distances of time and surprising the parties . . ." when all the evidence, once vivid, has since become obscure. Bowe v. La Buy (1934), 215 Wis. 1, 3, 253 N.W. 791, 792. The same essential policy considerations have guided the Pennsylvania courts as well. Schmucker v. Naugle (1967), 426 Pa. 203, 231 A.2d 121.

[5] A determination that Wisconsin's six-year statute controls would in no way affect any legitimate interest of Pennsylvania since their statute, like ours, is designed to protect defendants and in this case, Air Products, the Pennsylvania resident, is the plaintiff—not the defendant. Likewise, Pennsylvania is in no position to in anyway influence what Wisconsin feels to be an appropriate period of protection for both itself and defendants from stale lawsuits. Wilcox v. Wilcox, supra, 26 Wis.2d at page 634, 133 N.W.2d 408.

Moreover, by the decision of the legislature to permit aggrieved parties six instead of four years to prosecute their claims, a decision contrary to the recommended period by drafters of the Uniform Commercial Code which was ultimately adopted in Pennsylvania, the legislature determined that the interests of Wisconsin are best advanced by a longer period. We affirm the order sustained demurrers to defendants' affirmative defenses based on the statute of limitations.

Liquidated Damages Provision of Air Products' Purchase Orders

[6] The liquidated damages provisions of Air Products' purchase order provide as follows:

"Liquidated Damages:

"Delay in delivery

"Seller recognizes that failure to make delivery of drawings and other data or equipment conforming to the requirements of this purchase order in accordance with the delivery schedule contained in this purchase order will subject buyer to substantial damages due to delay and disruption of work schedules, inefficient use of manpower and other reasons, and that the amount of such damages will be difficult or impossible to ascertain with certainty. Seller, therefore, agrees that such damages shall be assessed and payable, as agreed and liquidated damages, and not as a penalty, in accordance with the schedule set forth at the end of this clause.

"Any other provision hereof to the contrary notwithstanding, no item required to be delivered hereunder shall be

deemed delivered unless the same conforms to the requirements of the order and, (a) in the case of drawings and other data, is mailed or otherwise delivered to buyer's offices at Allentown, Pennsylvania [and any other specified receivers[on or before the date specified, and, (b) in the case of equipment, is placed in the hands of a carrier for delivery VIA the most direct route to the destination indicated on the purchase order, on or before the date specified. In any case of partial delivery of an item, if permitted hereunder, the items shall not be deemed as received for purposes of this provision, until delivery of the last item required for its use, or installation, and operation. Unless otherwise provided, all time shall be computed on the basis of calendar days elapsing after the delivery date specified. Liquidated damages shall be computed for each item listed on the schedule separately.

"Buyers right to liquidated damages provided for herein shall be in addition to any and all other remedies of buyer, including, without limitation, its rights under paragraph 9 of the terms and conditions of this purchase order for default. In the event of any termination for default, liquidated damages for delay shall be computed, up to the maximums provided herein, to the date buyer places a new purchase order for the items covered by this order.

"In the event buyer shall be prevented from making delivery for reasons defined in paragraph 10 of the terms and conditions of this purchase order, seller shall grant such extension of the delivery schedules as shall, in its opinion, be justified, not to exceed in any event, however, the actual number of days such conditions is determined to have existed."

Readily apparent from a reading of the above provision is that it initially provides for the assessment of liquidated damages in case of failure by defendant to make delivery of equipment conforming to the specifications within the times set forth in the delivery schedule. The provision next provides that the right to recover liquidated damages as specified in an attached schedule "shall be in addition to any and all other remedies of the buyer."

The trial court concluded that the separate provisions were "inconsistent and ambiguous" and that on their face it cannot be determined as a matter of law whether Air Products is entitled to recover its full and actual damages or whether plaintiff's recovery is limited to the liquidated damages established in the contract and, therefore, "[a] construction of these contracts, if one is needed, cannot be properly effected by demurrer, but must be done at trial."

The trial court was evidently relying on the rule of law that "[w]hen the language of a contract, considered as a whole, is reasonably or fairly susceptible to different constructions, it is therefore ambiguous, and such being the situation, the sense in which the words are therein used is a question of fact." Lemke v. Larsen Co. (1967), 35 Wis.2d 427, 432, 151 N.W.2d 17, 19.

We agree with the trial court's conclusion that the separate provisions relating to liquidated damages are inconsistent and ambiguous. We affirm the order overruling this demurrer.

Limitations of Liability Provisions in Fairbanks Acknowledgments

[7] As an affirmative defense to all the causes of action pleaded by both Air Products and Hartford, Fairbanks set up a provision contained in its "acknowledgments of order" which were sent by Fairbanks to Air Products with Air Products' purchase order which it had executed. The "acknowledgment of order" from Fairbanks to Air Products has the follow-

ing language printed in reasonably bold face type at the bottom:

"WE THANK YOU FOR YOUR ORDER AS COPIED HEREON, WHICH WILL RECEIVE PROMPT ATTENTION AND SHALL BE GOVERNED BY THE PROVISIONS ON THE REVERSE SIDE HEREOF UNLESS YOU NOTIFY US TO THE CONTRARY WITHIN 10 DAYS OR BEFORE SHIPMENT WHICHEVER IS EARLIER. BEFORE ACCEPTING GOODS FROM TRANSPORTATION COMPANY SEE THAT EACH ARTICLE IS IN GOOD CONDITION. IF SHORTAGE OR DAMAGE IS APPARENT REFUSE SHIPMENT UNLESS AGENT NOTES DEFECT ON TRANSPORTATION BILL. ACCEPTANCE OF SHIPMENT WITHOUT COMPLYING WITH SUCH CONDITIONS IS AT YOUR OWN RISK.

"THIS IS NOT AN INVOICE. AN INVOICE FOR THIS MATERIAL WILL BE SENT YOU WITHIN A FEW DAYS.

"ACKNOWLEDGMENT OF ORDER"

On the reverse side of the "acknowledgment of order" there are printed six separate provisions which are appropriately numbered and at the very beginning it is stated that:

"The following provisions form part of the order acknowledged and accepted on the face hereof, as express agreements between Fairbanks, Morse & Co. ("Company") and the Buyer governing the terms and conditions of the sale, subject to modification only in writing signed by the local manager or an executive officer of the Company:"

Provision # 6 which is the subject of the dispute between the parties provides that:

"6.—The Company nowise assumes any responsibility or liability with respect to use, purpose, or suitability, and shall not be liable for damages of any character, whether direct of consequential, for defect, delay, or otherwise, its sole liability and obligation being confined to the replacement in the manner aforesaid or defectively manufactured guaranteed parts failing within the time stated."

Fairbanks contends that provision # 6 contained on the reverse side of their "acknowledgment of order" became part of the contract between it and Air Products while Air Products contends that its right to rely on the implied warranty of merchantability (U.C.C. 2–314) fitness for particular purposes (U.C.C. 2–315) and consequential damages (U.C.C. 2–714) has in no way been limited by provision #6, since it never was assented to by it, and, therefore, never became part of the contract. Both parties are in agreement that sec. 2–207, of the Uniform Commercial Code (12A Pennsylvania Statutes Ann. sec. 2–207) is the appropriate standard by which their rights must be determined.

Section 2–207 provides:

"(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.

"(2) The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:

"(a) the offer expressly limits acceptance to the terms of the offer;

"(b) they materially alter it; or

"(c) notification of objection to them has already been given or is given within

a reasonable time after notice of them is received.

"(3) Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract. In such case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act."

That the parties initial conclusion that sec. 2-207 is peculiarly applicable to the facts of their dispute is disclosed by the U.C.C. comment # 1. It is there stated:

"1. This section is intended to deal with two typical situations. The one is the written confirmation, where an agreement has been reached either orally or by informal correspondence between the parties and is followed by one or both of the parties sending formal memoranda embodying the terms so far as agreed upon and adding terms not discussed. The other situation is offer and acceptance, in which a wire or letter expressed and intended as an acceptance or the closing of an agreement adds further minor suggestions or proposals such as 'ship by Tuesday,' 'rush,' 'ship draft against bill of lading inspection allowed,' or the like. A frequent example of the second situation is the exchange of printed purchase order and acceptance (sometimes called 'acknowledgment') forms. Because the forms are oriented to the thinking of the respective drafting parties, the terms contained in them often do not correspond. Often the seller's form contains terms different from or additional to those set forth in the buyer's form. Nevertheless, the parties proceed with the transaction."

In reaching its conclusion that the demurrers of Air Products and Hartford to this affirmative defense should be overruled, the trial court summarized its reasoning as follows:

"It is therefore my conclusion that since these parties were merchants when they dealt with each other in the formation of this contract and since a contract actually came into existence by seasonable acceptance, that acceptance taking place by both the execution of the purchase order and the execution and delivery of the acknowledgment of order, simultaneous acts, and since the original offer to purchase contained no terms or provisions pertaining to the limitation of damages as pleaded in the eighth affirmative defense, that therefore these were completely new and additional proposed terms and, as between merchants, became binding as between the parties and, therefore, if proven, they could constitute a defense to some of plaintiff's claims."

In reaching the above conclusion, apparently the trial court did not consider subsection (2)(b) of Sec. 2-207.

One commentator has aptly stated the threshold questions involved in subsection (1):

"The second situation covered by this clause concerns confirmatory memoranda which follow an agreement. 'Confirmation' connotes that the parties reached an agreement before exchange of the forms in question. The purpose of Code drafters here must have been to make clear that confirmations need not mirror each other in order to find contract. Simply stated then, under this first clause of section 2-207(1), it is reasonable to assume that the parties have a deal, then there is a contract even though terms of the writings exchanged do not match.

"All of the language following the comma in subsection (1) simply preserves for the offeree his right to make a counter-offer if he does so expressly. This phrase cannot possibly effect the

deal between parties that have reached an agreement and then exchanged confirmations. In that situation it is too late for a counter-offer and subsection (2) must be applied to determine what becomes of the non-matching terms of the confirmations. Thus, under subsection (1), there are two instances in which a contract may not have been formed. First, if the offeror could not reasonably treat the response of the offeree as an acceptance there is no contract. Second, if the offeree's acceptance is made expressly conditional on the offeror's assent to variant provisions, the offeree has made a counter-offer. However, under section 2-207(3) either situation may result in contract formation by subsequent conduct of the parties." [1]

Because the reverse side of Fairbanks' Acknowledgment of Order states that the provisions contained there ". . . form part of the order acknowledged and accepted on the face hereof . . ." it would seem that Air Products could have "reasonably" assumed that the parties "had a deal."

Since there is no express provision in the purchase orders making assent to different or additional terms conditioned upon Air Products' assent to them, the second requirement of coming under U.C.C. 2-207 is also met.

Once having satisfied the requirements of subsection (1), any additional matter must fall in subsection (2).

The major impact of sec. 2-207 is that it altered the common law rule which precluded an acceptance from creating a contract if it in any way varied any term of the offer. Subsection (1) expressly provides that there may be a legally binding contract even if the acceptance contains terms "different from" or "additional to" the terms of the offer.

At this point a contract does in fact exist between the parties under (1). Subsection (2) must now be resorted to to see which of the "variant" terms will actually become part of the contract.

At this juncture, Air Products and Hartford argue that 2-207(2) only applies to "additional terms" while Fairbanks' limitation of liability provisions were "different." To this extent they contend terms are "additional" if they concern a subject matter that is not covered in the offer and "different" if the subject matter, although covered in the offer, was covered in a variant way. Hartford and Air Products' argument seems to expressly contradict Official U.C.C. Comment #3 which unequivocably starts "Whether or not *additional or different* terms will become part of the agreement depends upon the provisions of subsection (2)." (Emphasis added). One commentator has noted that:

> "On its face, subsection (2) seems only to apply to additional and not conflicting terms, and at least one court has interpreted the language this way. However, this is an unnecessarily limited construction and, as Comment 3 to the section points out, subsection (2) should apply to both additional and different provisions." 32 Univ.Pitt.L.Rev., supra, 211.

The case referred to is American Parts Co., Inc. v. American Arbitration Association (1967), 8 Mich.App. 156, 154 N.W.2d 5, where in explicitly limiting the application of (2) to additional terms the court said of the policy behind 2-207:

> "The policy of section 2-207 is that the parties should be able to enforce their agreement, whatever it is, despite discrepancies between the oral agreement and the confirmation (or between an offer and acceptance) *if enforcement can be granted without requiring either party to be bound to a material term to which*

1. Section 2-207 of the Uniform Commercial Code—New Rules for the "Battle of the Forms" (1971), 32 U. of PITT. L.Rev. 209, 210.

he has not agreed." (Emphasis added) 154 N.W.2d at p. 12.

The implication seems clear. A party cannot be expected to have assented to a "different" term.

The thrust of the "additional-different" dichotomy as averred for by Air Products and Hartford is that their offer as effectuated by a purchase order includes not only those terms which are expressly stated therein, but also those which are implied by law (e. g. warranty and damage) that will become a part of the contract formed by the sellers acceptance of the offer. Therefore, Fairbanks' limitation of liability terms are different since they are at variance with the implied warranty and damage terms in Air Products' offer. Fairbanks contends that because sec. 2-714(3) provides that "in a proper case" consequential damages may be recovered by an injured buyer they are clearly not implied in all contracts. Comment #4 to sec. 2-714 refers to the comment for sec. 2-715. It is there stated in comment #3 to sec. 2-715 that:

> "In the *absence of excuse under the section on merchant's excuse by failure of presupposed conditions,* the seller is liable for consequential damages in all cases where he had reason to know of the buyer's general or particular requirements at the time of contracting." (Emphasis added)

We think Fairbanks was aware of the particular needs of Air Products. A reading of section 2-714 and 2-715 indicates that a potential recovery for consequential loss is implicit in the contract.

Air Products and Hartford next contend that if the added terms of the "acknowledgment of order" were "additional" terms they still do not become part of the contract because the prerequisite to their becoming a part of the contract which are contained in subsection (2) were not satisfied. Section 2-207(2) required that:

> "The additional terms are to be construed as proposals for addition to the contract. Between merchants such terms become part of the contract unless:
>
> "(a) the offer expressly limits acceptance to the terms of the offer;
>
> "(b) they materially alter it; or
>
> "(c) notification of objection to them has already been given or is given within a reasonable time after notice of them is received."

The language employed by Air Products in its "terms and conditions" was not express enough to bring into play the provisions of either subsection 2-207(a) or (c). The ultimate question to be determined, therefore, is whether the disclaimer contained in Fairbanks' "acknowledgment of order" materially altered the agreement between the parties pursuant to sec. 2-207(2)(b). If they materially alter what would otherwise be firmed by the acceptance of an offer, they will not become terms unless the buyer expressly agrees thereto. "If, however, they are terms which would not so change the bargain they will be incorporated unless notice of objection to them has already been given or is given within a reasonable time." Comment #3 to sec. 2-207.

Hartford and Air Products contend that the eradication of a multi-million dollar damage exposure is *per se* material. Fairbanks bases its argument on the ground that consequential damages may not be recovered except in "special circumstances" or in a "proper case." (2-714(2), (3). As already stated, these "special circumstances" would seem by Comment #3 to sec. 2-715 to be referring to situations which concern instances where the seller did not have reason to know of buyer's general or particular requirements at the time of contracting. "Consequential damages resulting from the seller's breach include (a) any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not

reasonably be prevented by cover or otherwise; . . ." U.C.C. sec. 2-715(2)(a)

While the comment #4 clearly indicates that a disclaimer of an implied warranty of merchantability is material, there is no good reason to hold that a disclaimer that has the effect of eliminating millions of dollars in damages should become a part of a contract by operation of law.

We conclude that the disclaimer for consequential loss was sufficiently material to require express conversation between the parties over its inclusion or exclusion in the contract. It follows that the order overruling the demurrers of Air Products and Hartford must be reversed.

Question of Strict Liability

[8] Air Products and Hartford have also appealed from the orders sustaining Fairbanks' demurrers to certain of their causes of action and causes of action as amended which sound in strict liability. Air Products fourth cause of action as originally pleaded is representative of the others demurred to as well and reads as follows:

"Fourth Cause of Action

"21. Realleges and incorporates as though fully set forth herein the averments of paragraphs one, two, three, four and seven.

"[1. Name of plaintiff and residence]

"[2. Name of defendant, residence and business]

"[3. The contract for an 11,000—horsepower motor and its specifications]

"[4. That defendant manufactured said motor and shipped it to plaintiff]

"[7. That it was defective]

"22. Defendant was aware when it entered into said contract with plaintiff that said motor would come into plaintiff's possession without there being any substantial change in its condition after it was shipped to plaintiff by defendant. There was no substantial change in the condition of said motor from the time when it was shipped by defendant and received by plaintiff.

"23. Subsequent to its installation plaintiff attempted to operate said motor so it would deliver 11,000 horsepower, and drive said compressor, but said motor did not operate properly because of the defects specified in paragraph 7.

"24. Because of the defects specified in paragraph 7, said motor was not reasonably fit for the ordinary purposes for which such motors are sold and used, to-wit: to operate effectively at 11,000 horsepower, without breaking down, for a reasonable period of time.

"25. As a result of defendant furnishing plaintiff with said motor with said defects in it, plaintiff has sustained damages for repairs, alterations and lost profits in the amount of Thirty One Thousand ($31,000) Dollars."

After the initial demurrer was sustained, Air Products amended paragraph 24 to read as follows:

"24a. The motor because of the aforesaid defects in the fan blades was unreasonably dangerous to certain property of Plaintiff, to-wit: components of said motor other than the portion of the motor containing and/or embodying the defect."

In sustaining the demurrers to the amended complaints, the trial court reasoned that before a cause of action for strict liability could be started under either Pennsylvania or Wisconsin law, it must be alleged that the defective product actually caused ***physical harm*** to property of the plaintiff, and that the property harmed must be property ***other than itself***; to put it another way, the complaint must set forth damages for something other than pure economic loss.

Although this court has very recently extended the strict liability doctrine of Dippel v. Sciano (1967), 37 Wis.2d 443, 155 N.W.2d 55, to injured bystanders, Howes v. Hansen (1972), 56 Wis.2d 247, 201 N.W.2d 825, the parties seek only that this court apply Pennsylvania law in determining the outcome of this question and, therefore, it would seem that any further extensions of the doctrine in Wisconsin will have to await consideration until another day.

The parties have extensively briefed the question of whether the doctrine of strict liability should apply to pure "economic loss" and they have cited this court to a host of authorities and to cases of other jurisdiction [2] both favoring [3] and disfavoring [4] its application. Since the adoption of Sec. 402A of Restatement, 2 Torts 2d, pp. 347, 348 [5] by the Supreme Court of Pennsylvania in Webb v. Zern (1966), 422 Pa. 424, 220 A.2d 853, that court has never expressly considered their rule of strict liability as it relates to the precise issue now before this court. They have, however, had occasion to make extensive comments on the subject.

In Kassab v. Central Soya (1968), 432 Pa. 217, 246 A.2d 848, the court was there confronted with the question of whether to eliminate the privity requirement in assumpsit suits by purchasers against remote manufacturers for breach of implied warranty. The plaintiffs were raisers of breed cattle and in the course of that activity, purchased quantities of cattle feed which had been manufactured by the defendant. The purchased feed contained "stilbestrol" although the packaging did not so state, and although plaintiffs gave the feed to their animals ". . . the herd began to abort and the breed bull began behaving in a manner which tended to cast doubt upon his masculinity. He was eventually pronounced sterile." Because of community knowledge of what the herd had eaten, the price that the stock brought was greatly diminished and the plaintiff sued for the diminution in market value.

As one of its justifications for doing away with the privity requirement in implied warranty actions, the court analogized to the doctrine of strict liability under the restatement. The court at 246 A. 2d 848, at pages 853–854, stated:

> "Therefore, prior to the adoption of section 402a, it could be said that to dispense with privity would be to allow recovery in contract without proof of neg-

2. E. g. Note, Manufacturer's Liability to Remote Purchasers for "Economic Loss"—Tort or Contract (1966), 114 Univ.Pa.L.Rev. 539, Prosser, The Fall of the Citadel—Strict Liability to the Consumer (1966), 50 Minn.L.Rev. 791, Note, Economic Loss in Products Liability (1966), 66 Col.L.Rev. 917.

3. Arrow Transportation Co. v. Fruehauf Corp. (D.C.Or.1968), 289 F.Supp. 170; Santor v. A & M. Karagheusian, Inc. (1965), 44 N.J. 52, 207 A.2d 305; Cova v. Harley Davidson Motor Company (1970), 26 Mich.App. 602, 182 N.W.2d 800.

4. Seely v. White Motor Company (1965), 63 Cal.2d 9, 45 Cal.Rptr. 17, 403 P.2d 145; Price v. Gatlin (1965), 241 Or. 315, 405 P.2d 502; Southwest Forest Industries, Inc. v. Westinghouse Electric Corp. (9th Cir. 1970), 422 F.2d 1013, cert. denied, 400 U.S. 902, 91 S.Ct. 138, 27 L.Ed.2d 138.

5. "Section 402A, Restatement, 2 Torts (2d), pages 347–348, provides:
"Sec. 402A. Special liability of Seller of Product for Physical Harm to User or Consumer.
"(1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
"(a) the seller is engaged in the business of selling a product, and
"(b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
"(2) The rule stated in subsection (1) applies although
"(a) the seller has exercised all possible care in the preparation and sale of his product, and
"(b) the user or consumer has not bought the product from or entered into any contractual relation with the seller."

ligence, while requiring a showing of negligence in order to recover for the same wrong against the same defendant if suit were brought in tort. To permit the result of a lawsuit to depend solely on the caption atop plaintiff's complaint is not now, and has never been, a sound resolution of identical controversies.

"However, with Pennsylvania's adoption of Restatement 402a, the same demands of legal symmetry which once supported privity now destroy it. Under the Restatement, if an action be commenced in tort by a purchaser of a defective product against a remote manufacturer, recovery may be had without a showing of negligence, and without a showing of privity, *for any damage inflicted upon the person or property* of the plaintiff as a result of this defective product . . .

"Thus, in the present case, for example, appellants' complaint alleging that their property (cattle) was damaged (rendered valueless as breeding stock) by virtue of the physical harm caused when these animals ate appellee-Soya's defective feed would have been sufficient to state a valid cause of action had it been captioned 'Complaint in Trespass.' However, because appellants elected to style their complaint as one in assumpsit for breach of warranty under the code, the requirement of privity would prevent these identical allegations from making out a good cause of action. This dichotomy of result is precisely the same evil which, prior to the Restatement, prevented the abolition of privity. It now compels this abolition."

Fairbanks contends that the proper theory in cases concerning economic loss of the type here involved in a commercial transaction is breach of warranty under the Uniform Commercial Code and not strict liability. To this contention the Pennsylvania court in a very lengthy footnote discussed the similarities between their interpretation of remedies under both the code and the restatement, and of their overall concern to make the two co-extensive.

"The language of the Restatement, speaking as it does of injury to either the individual or his property, appears broad enough to cover practically all of the harm that could befall one due to a defective product. Thus, for example, were one to buy a defective gas range which exploded, ruining the buyer's kitchen, injuring him, and of course necessitating a replacement of the stove itself, all of these three elements of the injury should be compensable. The last, replacing the stove, has been sometimes referred to as 'economic loss,' i. e., 'the diminution in the value of the product because it is inferior in quality and does not work for the general purposes for which it was manufactured and sold.' Comment, 114 U.Pa.L.Rev. 539, 541 (1966). There would seem to be no reason for excluding this measure of damages in an action brought under the Restatement, since the defective product itself is as much 'property' as any other possession of the plaintiff that is damaged as a result of the manufacturing flaw. Thus, since the tort action would enable plaintiff to recover for economic loss (the physical harm necessitated by 402a would, ipso facto, be present given the defect in the product which caused the damage), so also should this form of damages be compensable in contract. Contract cases from other jurisdictions dispensing with privity have allowed recovery for all three types of injury: personal injury, Henningsen v. Bloomfield Motors, Inc., [32 N.J. 358, 161 A.2d 69] *supra* note 1; injury to plaintiff's property other than the defective article itself, Morrow v. Caloric Appliance Co., [372 S.W.2d 41] *supra* note 1; and 'economic loss,' State Farm Mut. Auto Ins. Co. v. Anderson-Weber, Inc., *supra* note 1." 246 A.2d 848, at pages 854–855.

No pronouncement of the Pennsylvania Supreme Court can be found which would in any way detract from this broad policy statement.

Given the fact that this very broad language concerning the scope of damages

which would be covered under sec. 402A of the Restatement in Pennsylvania was "volunteered" by the court and also given the fact that it was made after the decisions of other jurisdictions in which strict liability was made inapplicable to pure "economic loss" indicating that it was made in spite of those decisions, we think the amended complaints containing allegations that the machines were unreasonably dangerous to other parts of themselves have set forth a valid cause of action for strict liability under Pennsylvania law. Therefore, the order sustaining Fairbanks' demurrer to the amended complaints must be reversed.

The order sustaining plaintiff's demurrers to defendant's affirmative defenses based on the statute of limitations is affirmed. The order overruling plaintiff's demurrers to defendant's affirmative defenses based on the liquidated damages provisions of Air Products purchase orders is affirmed. The order overruling plaintiff's demurrers to defendant's affirmative defenses based on limitations of liability in Fairbanks' acknowledgment of order is reversed. The order sustaining the demurrers to plaintiff's amended complaints alleging a cause of action for strict liability is reversed. No costs to be taxed in this court.

58 Wis.2d 424

In the Matter of the Racine County Court Order against Judge John W. REYNOLDS.

Supreme Court of Wisconsin.

April 17, 1973.

Original prohibition proceeding to enjoin county court from requiring federal district judge to show cause why he was not in contempt of court. The Supreme Court held that county court judge did not have authority to require federal district judge to appear in county court to show cause why he should not desist from interfering with contempt proceeding in divorce action pending in county court and that county judge did not have authority to ignore removal of show cause order to federal court because he believed the federal removal statute was unconstitutional and had no authority to decide the constitutionality of the removal statute.

Writ issued.

Hallows, C. J., concurred and filed opinion in which Connor T. Hansen and Robert W. Hansen, JJ., joined.

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Removal of Cases ⇐96

County court judge did not have authority to require federal district judge to appear in county court to show cause why he should not desist from interfering with contempt proceeding in divorce action pending in county court and county judge did not have authority to ignore removal of show cause order to federal court because he believed the federal removal statute was unconstitutional and had no authority to decide the constitutionality of the removal statute. 28 U.S.C.A. §§ 1441(a, b), 1442(a)(3), 1446(e).

David J. Cannon, U. S. Atty., Milwaukee, for Judge Reynolds.

Robert K. Weber, Asst. Corp. Counsel, Racine, for Judge Richard G. Harvey, Jr.

PER CURIAM.

On February 19, 1973, Judge John W. Reynolds of the Federal District Court for the Eastern District of Wisconsin, by United States Attorney David J. Cannon, petitioned this court for a writ of prohibition against the Honorable Richard G. Harvey, Jr., Judge of the County Court of Racine County. This petition asked for a writ commanding Judge Harvey to desist and refrain from any further proceedings in a matter pending in the county court of

79 Sickels 538, 124 N.Y. 538, 27 N.E. 256

(Cite as: 124 N.Y. 538)

LOUISA W. HAMER, Appellant,

v.

FRANKLIN SIDWAY, as Executor, etc., Respondent.

Court of Appeals of New York.

Argued February 24, 1891.

Decided April 14, 1891.

*538 S., defendant's testator, agreed with W., his nephew, plaintiff's assignor, that if he would refrain from drinking liquor, using tobacco, swearing and playing cards or billiards for money until he should become twenty-one years of age he would pay him $5,000. W. performed his part of the agreement; he became of age in 1875. Soon thereafter he wrote to S. advising him of such performance, stating that the sum specified was due him, and asking payment. S. replied admitting the agreement *539 and the performance and stating that he had the money in bank, set apart, which he proposed to hold for W. until the latter was capable of taking care of it. It was thereupon agreed between the parties that the money should remain in the hands of S. on interest. In an action upon the agreement, held, that it was founded upon a good consideration and was valid and enforceable.

It is not essential in order to make out a good consideration for a promise to show that the promisor was benefited or the promisee injured; a waiver on the part of the latter of a legal right is sufficient.

S. died in 1887 without having paid any portion of the sum agreed upon. Held, that under the agreement made in 1875, the relation of the parties thereafter was not that of debtor and creditor, but of trustee and cestui que trust; and that, therefore, the claim was not barred by the Statute of Limitations.

It did not appear upon the face of the complaint that the original agreement was not in writing, and so prohibited by the Statute of Frauds, because not to be performed within a year. Held, that as no such defense was set up in the answer, it was not available.

Also held, that the statements of S., subsequent to the date of final performance on the part of the promisee, was a waiver of such defense.

Mallory v. Gillett (21 N. Y. 412); Belknap v. Bender (75 id. 446); Berry v. Brown (107 id. 659); Beaumont v. Reeve (Shirley's L. C. 6); Porterfield v. Butler (47 Miss. 165); Duvoll v. Wilson (9 Barb. 487); In re Wilber v. Warren (104 N. Y. 192); Vanderbilt v. Schreyer (91 id. 392); Robinson v. Jewett (116 id. 40), distinguished.

Hamer v. Sidway (57 Hun, 229), reversed.

APPEAL from order of the General Term of the Supreme Court in the fourth judicial department, made July 1, 1890, which reversed a judgment in favor of plaintiff entered upon a decision of the court on trial at Special Term and granted a new trial.

This action was brought upon an alleged contract.

The plaintiff presented a claim to the executor of William E. Story, Sr., for $5,000 and interest from the 6th day of February, 1875. She acquired it through several mesne assignments from William E. Story, 2d. The claim being rejected by the executor, this action was brought. It appears that William E. Story, Sr., was the uncle of William E. Story, 2d; that at the celebration of the golden wedding of Samuel *540 Story and wife, father and mother of William E. Story, Sr., on the 20th day of March, 1869, in the presence of the family and invited guests he promised his nephew that if he would refrain from drinking, using tobacco, swearing and playing cards or billiards for money until he became twenty-one years of age he would pay him a sum of $5,000. The nephew assented thereto and fully performed the conditions inducing the promise. When the nephew arrived at the age of twenty-one years and on the 31st day of January, 1875, he wrote to his uncle informing him that he had performed his part of the agreement and had thereby become entitled to the sum of $5,000. The uncle received the letter and a few days later and on the sixth of February, he wrote and mailed to his nephew the following letter:

'BUFFALO, Feb. 6, 1875.

'W. E. STORY, Jr.:

'DEAR NEPHEW--Your letter of the 31st ult. came to hand all right, saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have five thousand dollars as I promised you. I had the money in the bank the day you was 21 years old that I intend for you, and you shall have the money certain. Now, Willie I do not intend to interfere with this money in any way till I think you are capable of taking care of it and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. The first five thousand dollars that I got together cost me a heap of hard work. You would hardly believe me when I tell you that to obtain this I shoved a jackplane many a day, butchered three or four years, then came to this city, and after three months' perseverence I obtained a situation in a grocery store. I opened this store early, closed late, slept in the fourth story of the building in a room 30 by 40 feet and not a human being in the building but myself. All this I done to live as cheap as I could to save something. I don't want you to take up with this kind of fare. I was here in the cholera season '49 and '52 *541 and the deaths averaged 80 to 125 daily and plenty of small-pox. I wanted to go home, but Mr. Fisk, the gentleman I was working for, told me if I left then, after it got healthy he probably would not want me. I stayed. All the money I have saved I know just how I got it. It did

not come to me in any mysterious way, and the reason I speak of this is that money got in this way stops longer with a fellow that gets it with hard knocks than it does when he finds it. Willie, you are 21 and you have many a thing to learn yet. This money you have earned much easier than I did besides acquiring good habits at the same time and you are quite welcome to the money; hope you will make good use of it. I was ten long years getting this together after I was your age. Now, hoping this will be satisfactory, I stop. One thing more. Twenty-one years ago I bought you 15 sheep. These sheep were put out to double every four years. I kept track of them the first eight years; I have not heard much about them since. Your father and grandfather promised me that they would look after them till you were of age. Have they done so? I hope they have. By this time you have between five and six hundred sheep, worth a nice little income this spring. Willie, I have said much more than I expected to; hope you can make out what I have written. To-day is the seventeenth day that I have not been out of my room, and have had the doctor as many days. Am a little better to-day; think I will get out next week. You need not mention to father, as he always worries about small matters.

Truly Yours,

'W. E. STORY.

'P. S.--You can consider this money on interest.'

The nephew received the letter and thereafter consented that the money should remain with his uncle in accordance with the terms and conditions of the letters. The uncle died on the 29th day of January, 1887, without having paid over to his nephew any portion of the said $5,000 and interest.

PARKER, J.

The question which provoked the most discussion by counsel on this appeal, and which lies at the foundation of plaintiff's asserted right of recovery, is whether by virtue of a contract defendant's testator William E. Story became indebted to his nephew William E. Story, 2d, on his twenty-first birthday in the sum of five thousand dollars. The trial court found as a fact that 'on the 20th day of March, 1869, * * * William E. Story agreed to and with William E. *545 Story, 2d, that if he would refrain from drinking liquor, using tobacco, swearing, and playing cards or billiards for money until he should become 21 years of age then he, the said William E. Story, would at that time pay him, the said William E. Story, 2d, the sum of $5,000 for such refraining, to which the said William E. Story, 2d, agreed,' and that he 'in all things fully performed his part of said agreement.'

The defendant contends that the contract was without consideration to support it, and, therefore,

invalid. He asserts that the promisee by refraining from the use of liquor and tobacco was not harmed but benefited; that that which he did was best for him to do independently of his uncle's promise, and insists that it follows that unless the promisor was benefited, the contract was without consideration. A contention, which if well founded, would seem to leave open for controversy in many cases whether that which the promisee did or omitted to do was, in fact, of such benefit to him as to leave no consideration to support the enforcement of the promisor's agreement. Such a rule could not be tolerated, and is without foundation in the law. The Exchequer Chamber, in 1875, defined consideration as follows: 'A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to the one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.' Courts 'will not ask whether the thing which forms the consideration does in fact benefit the promisee or a third party, or is of any substantial value to anyone. It is enough that something is promised, done, forborne or suffered by the party to whom the promise is made as consideration for the promise made to him.' (Anson's Prin. of Con. 63.)

'In general a waiver of any legal right at the request of another party is a sufficient consideration for a promise.' (Parsons on Contracts, 444.)

'Any damage, or suspension, or forbearance of a right will be sufficient to sustain a promise.' (Kent, vol. 2, 465, 12th ed.)

Pollock, in his work on contracts, page 166, after citing the definition given by the Exchequer Chamber already quoted, *546 says: 'The second branch of this judicial description is really the most important one. Consideration means not so much that one party is profiting as that the other abandons some legal right in the present or limits his legal freedom of action in the future as an inducement for the promise of the first.'

Now, applying this rule to the facts before us, the promisee used tobacco, occasionally drank liquor, and he had a legal right to do so. That right he abandoned for a period of years upon the strength of the promise of the testator that for such forbearance he would give him $5,000. We need not speculate on the effort which may have been required to give up the use of those stimulants. It is sufficient that he restricted his lawful freedom of action within certain prescribed limits upon the faith of his uncle's agreement, and now having fully performed the conditions imposed, it is of no moment whether such performance actually proved a benefit to the promisor, and the court will not inquire into it, but were it a proper subject of inquiry, we see nothing in this record that would permit a determination that the uncle was not benefited in a legal sense. Few cases have been found which may be said to be precisely in point, but such as have been support the position we have taken.

In Shadwell v. Shadwell (9 C. B. [N. S.] 159), an uncle wrote to his nephew as follows:

'MY DEAR LANCEY--I am so glad to hear of your intended marriage with Ellen Nicholl, and as I promised to assist you at starting, I am happy to tell you that I will pay to you 150 pounds yearly during my life and until your annual income derived from your profession of a chancery barrister shall amount to 600 guineas, of which your own admission will be the only evidence that I shall require.
'Your affectionate uncle,
'CHARLES SHADWELL.'

It was held that the promise was binding and made upon good consideration.

*547 In Lakota v. Newton, an unreported case in the Superior Court of Worcester, Mass., the complaint averred defendant's promise that 'if you (meaning plaintiff) will leave off drinking for a year I will give you $100,' plaintiff's assent thereto, performance of the condition by him, and demanded judgment therefor. Defendant demurred on the ground, among others, that the plaintiff's declaration did not allege a valid and sufficient consideration for the agreement of the defendant. The demurrer was overruled.

In Talbott v. Stemmons (a Kentucky case not yet reported), the step-grandmother of the plaintiff made with him the following agreement: 'I do promise and bind myself to give my grandson, Albert R. Talbott, $500 at my death, if he will never take another chew of tobacco or smoke another cigar during my life from this date up to my death, and if he breaks this pledge he is to refund double the amount to his mother.' The executor of Mrs. Stemmons demurred to the complaint on the ground that the agreement was not based on a sufficient consideration. The demurrer was sustained and an appeal taken therefrom to the Court of Appeals, where the decision of the court below was reversed. In the opinion of the court it is said that 'the right to use and enjoy the use of tobacco was a right that belonged to the plaintiff and not forbidden by law. The abandonment of its use may have saved him money or contributed to his health, nevertheless, the surrender of that right caused the promise, and having the right to contract with reference to the subject-matter, the abandonment of the use was a sufficient consideration to uphold the promise.' Abstinence from the use of intoxicating liquors was held to furnish a good consideration for a promissory note in Lindell v. Rokes (60 Mo. 249).

The cases cited by the defendant on this question are not in point. In Mallory v. Gillett (21 N. Y. 412); Belknap v. Bender (75 id. 446), and Berry v. Brown (107 id. 659), the promise was in contravention of that provision of the Statute of Frauds, which declares void all promises to answer for the debts of third persons unless reduced to writing. In Beau*548 mont v. Reeve (Shirley's L. C. 6), and Porterfield v. Butler (47 Miss. 165), the question was whether a moral obligation furnishes sufficient consideration to uphold a subsequent express promise. In Duvoll v. Wilson (9 Barb. 487), and In re Wilber v. Warren (104 N. Y. 192), the proposition involved was

whether an executory covenant against incumbrances in a deed given in consideration of natural love and affection could be enforced. In Vanderbilt v. Schreyer (91 N. Y. 392), the plaintiff contracted with defendant to build a house, agreeing to accept in part payment therefor a specific bond and mortgage. Afterwards he refused to finish his contract unless the defendant would guarantee its payment, which was done. It was held that the guarantee could not be enforced for want of consideration. For in building the house the plaintiff only did that which he had contracted to do. And in Robinson v. Jewett (116 N. Y. 40), the court simply held that 'The performance of an act which the party is under a legal obligation to perform cannot constitute a consideration for a new contract.' It will be observed that the agreement which we have been considering was within the condemnation of the Statute of Frauds, because not to be performed within a year, and not in writing. But this defense the promisor could waive, and his letter and oral statements subsequent to the date of final performance on the part of the promisee must be held to amount to a waiver. Were it otherwise, the statute could not now be invoked in aid of the defendant. It does not appear on the face of the complaint that the agreement is one prohibited by the Statute of Frauds, and, therefore, such defense could not be made available unless set up in the answer. (Porter v. Wormser, 94 N. Y. 431, 450.) This was not done.

In further consideration of the questions presented, then, it must be deemed established for the purposes of this appeal, that on the 31st day of January, 1875, defendant's testator was indebted to William E. Story, 2d, in the sum of $5,000, and if this action were founded on that contract it would be barred by the Statute of Limitations which has been pleaded, but on that date the nephew wrote to his uncle as follows:

*549 'DEAR UNCLE--I am now 21 years old to-day, and I am now my own boss, and I believe, according to agreement, that there is due me $5,000. I have lived up to the contract to the letter in every sense of the word.'

A few days later, and on February sixth, the uncle replied, and, so far as it is material to this controversy, the reply is as follows:

'DEAR NEPHEW--Your letter of the 31st ult. came to hand all right saying that you had lived up to the promise made to me several years ago. I have no doubt but you have, for which you shall have $5,000 as I promised you. I had the money in the bank the day you was 21 years old that I intended for you, and you shall have the money certain. Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it, and the sooner that time comes the better it will please me. I would hate very much to have you start out in some adventure that you thought all right and lose this money in one year. * * * This money you have earned much easier than I did, besides acquiring good habits at the same time, and you are quite welcome to the money. Hope you will make good use of it. * * *
W. E. STORY.

'P. S.--You can consider this money on interest.'

The trial court found as a fact that 'said letter was received by said William E. Story, 2d, who thereafter consented that said money should remain with the said William E. Story in accordance with the terms and conditions of said letter.' And further, 'That afterwards, on the first day of March, 1877, with the knowledge and consent of his said uncle, he duly sold, transferred and assigned all his right, title and interest in and to said sum of $5,000 to his wife Libbie H. Story, who thereafter duly sold, transferred and assigned the same to the plaintiff in this action.'

We must now consider the effect of the letter, and the nephew's assent thereto. Were the relations of the parties thereafter that of debtor and creditor simply, or that of trustee *550 and cestui que trust? If the former, then this action is not maintainable, because barred by lapse of time. If the latter, the result must be otherwise. No particular expressions are necessary to create a trust. Any language clearly showing the settler's intention is sufficient if the property and disposition of it are definitely stated. (Lewin on Trusts, 55.)

A person in the legal possession of money or property acknowledging a trust with the assent of the cestui que trust, becomes from that time a trustee if the acknowledgment be founded on a valuable consideration. His antecedent relation to the subject, whatever it may have been, no longer controls. (2 Story's Eq. § 972.) If before a declaration of trust a party be a mere debtor, a subsequent agreement recognizing the fund as already in his hands and stipulating for its investment on the creditor's account will have the effect to create a trust. (Day v. Roth, 18 N. Y. 448.)

It is essential that the letter interpreted in the light of surrounding circumstances must show an intention on the part of the uncle to become a trustee before he will be held to have become such; but in an effort to ascertain the construction which should be given to it, we are also to observe the rule that the language of the promisor is to be interpreted in the sense in which he had reason to suppose it was understood by the promisee. (White v. Hoyt, 73 N. Y. 505, 511.) At the time the uncle wrote the letter he was indebted to his nephew in the sum of $5,000, and payment had been requested. The uncle recognizing the indebtedness, wrote the nephew that he would keep the money until he deemed him capable of taking care of it. He did not say 'I will pay you at some other time,' or use language that would indicate that the relation of debtor and creditor would continue. On the contrary, his language indicated that he had set apart the money the nephew had 'earned' for him so that when he should be capable of taking care of it he should receive it with interest. He said: 'I had the money in the bank the day you were 21 years old that I intended for you and you shall have the money certain.' That he had set apart the money is further *551 evidenced by the next sentence: 'Now, Willie, I don't intend to interfere with this money in any way until I think you are capable of taking care of it.' Certainly, the uncle must have intended that

his nephew should understand that the promise not 'to interfere with this money' referred to the money in the bank which he declared was not only there when the nephew became 21 years old, but was intended for him. True, he did not use the word 'trust,' or state that the money was deposited in the name of William E. Story, 2d, or in his own name in trust for him, but the language used must have been intended to assure the nephew that his money had been set apart for him, to be kept without interference until he should be capable of taking care of it, for the uncle said in substance and in effect: 'This money you have earned much easier than I did * * * you are quite welcome to. I had it in the bank the day you were 21 years old and don't intend to interfere with it in any way until I think you are capable of taking care of it and the sooner that time comes the better it will please me.' In this declaration there is not lacking a single element necessary for the creation of a valid trust, and to that declaration the nephew assented.

The learned judge who wrote the opinion of the General Term, seems to have taken the view that the trust was executed during the life-time of defendant's testator by payment to the nephew, but as it does not appear from the order that the judgment was reversed on the facts, we must assume the facts to be as found by the trial court, and those facts support its judgment.

The order appealed from should be reversed and the judgment of the Special Term affirmed, with costs payable out of the estate.

All concur.

Order reversed and judgment of Special Term affirmed.

Mills v. Wyman

DANIEL MILLS

v.

SETH WYMAN.

20 Mass. 207

Mass. 1825.

THIS was an action of assumpsit brought to recover a compensation for the board, nursing, &c., of Levi Wyman, son of the defendant, from the 5th to the 20th of February, 1821. The plaintiff then lived at Hartford, in Connecticut; the defendant, at Shrewsbury, in this county. Levi Wyman, at the time when the services were rendered, was about 25 years of age, and had long ceased to be a member of his father's family. He was on his return from a voyage at sea, and being suddenly taken sick at Hartford, and being poor and in distress, was relieved by the plaintiff in the manner and to the extent above stated. On the 24th of February, after all the expenses had been incurred, the defendant wrote a letter to the plaintiff, promising to pay him such expenses. There was no consideration for this promise, except what grew out of the relation which subsisted between Levi Wyman and the defendant, and Howe J., before whom the cause was tried in the Court of Common Pleas, thinking this not sufficient to support the action, directed a nonsuit. To this direction the plaintiff filed exceptions.

The opinion of the Court was read, as drawn up by

PARKER C. J.

General rules of law established for the protection and security of honest and fair-minded men, who may inconsiderately make promises without any equivalent, will sometimes screen men of a different character from engagements which they are bound in foro conscientiae to perform. This is a defect inherent in all human systems of legislation. The rule that a mere verbal promise, without any consideration, cannot be enforced by action, is universal in its application, and cannot be departed from to suit particular cases in which a refusal to perform such a promise may be disgraceful.

The promise declared on in this case appears to have been made without any legal consideration. The kindness and services towards the sick son of the defendant were not bestowed *227 at his request. The son was in no respect under the care of the defendant. He was twenty-five years old, and had long left his father's family. On his return from a foreign country, he fell sick among strangers, and the plaintiff acted the part of the good Samaritan, giving him shelter and comfort until he died. The defendant, his father, on being informed of this event, influenced by a transient feeling of gratitude, promises in writing to pay the plaintiff for the expenses he had incurred. But he has determined to break this promise, and is willing to have his case appear on record as a strong example of particular injustice sometimes necessarily resulting from the operation of general rules.

It is said a moral obligation is a sufficient consideration to support an express promise; and some authorities lay down the rule thus broadly; but upon examination of the cases we are satisfied that the universality of the rule cannot be supported, and that there must have been some preexisting obligation, which has become inoperative by positive law, to form a basis for an effective promise. The cases of debts barred by the statute of limitations, of debts incurred by infants, of debts of bankrupts, are generally put for illustration of the rule. Express promises founded on such preexisting equitable obligations may be enforced; there is a good consideration for them; they merely remove an impediment created by law to the recovery of debts honestly due, but which public policy protects the debtors from being compelled to pay. In all these cases there was originally a quid pro quo; and according to the principles of natural justice the party receiving ought to pay; but the legislature has said he shall not be coerced; then comes the promise to pay the debt that is barred, the promise of the man to pay the debt of the infant, of the discharged bankrupt to restore to his creditor what by the law he had lost. In all these cases there is a moral obligation founded upon an antecedent valuable consideration. These promises therefore have a sound legal basis. They are not promises to pay something for nothing; not naked pacts; but the voluntary revival or creation of obligation which before existed in natural law, but which had been dispensed with, not for the benefit of the party obliged solely, but principally for the public convenience *228 If moral obligation, in its fullest sense, is a good substratum for an express promise, it is not easy to perceive why it is not equally good to support an implied promise. What a man ought to do, generally he ought to be made to do, whether he promise or refuse. But the law of society has left most of such obligations to the interior forum, as the tribunal of conscience has been aptly called. Is there not a moral obligation upon every son who has become affluent by means of the education and advantages bestowed upon him by his father, to relieve that father from pecuniary embarrassment, to promote his comfort and happiness, and even to share with him his riches, if thereby he will be made happy? And yet such a son may, with impunity, leave such a father in any degree of penury above that which will expose the community in which he dwells, to the danger of being obliged to preserve him from absolute want. Is not a wealthy father under strong moral obligation to advance the interest of an obedient, well disposed son, to furnish him with the means of acquiring and maintaining a becoming rank in life, to rescue him from the horrors of debt incurred by misfortune? Yet the law will uphold him in any degree of parsimony, short of that which would reduce his son to the necessity of seeking public charity.

**3 Without doubt there are great interests of society which justify withholding the coercive arm of the law from these duties of imperfect obligation, as they are called; imperfect, not because they are less binding upon the conscience than those which are called perfect, but because the wisdom of the social law does not impose sanctions upon them.

A deliberate promise, in writing, made freely and without any mistake, one which may lead the party to whom it is made into contracts and expenses, cannot be broken without a violation of moral duty. But if there was nothing paid or promised for it, the law, perhaps wisely, leaves the execution of it to the conscience of him who makes it. It is only when the party making the promise gains something, or he to whom it is made loses something, that the law gives the promise validity. And in the case of the promise of the adult to pay the debt of the infant, of the debtor

discharged by the statute of limitations *229 or bankruptcy, the principle is preserved by looking back to the origin of the transaction, where an equivalent is to be found. An exact equivalent is not required by the law; for there being a consideration, the parties are left to estimate its value: though here the courts of equity will step in to relieve from gross inadequacy between the consideration and the promise.

These principles are deduced from the general current of decided cases upon the subject, as well as from the known maxims of the common law. The general position, that moral obligation is a sufficient consideration for an express promise, is to be limited in its application, to cases where at some time or other a good or valuable consideration has existed.

A legal obligation is always a sufficient consideration to support either an express or an implied promise; such as an infant's debt for necessaries, or a father's promise to pay for the support and education of his minor children. But when the child shall have attained to manhood, and shall have become his own agent in the world's business, the debts he in curs, whatever may be their nature, create no obligation upon the father; and it seems to follow, that his promise founded upon such a debt has no legally binding force.

**4 The cases of instruments under seal and certain mercantile contracts, in which considerations need not be proved, do not contradict the principles above suggested. The first import a consideration in themselves, and the second belong to a branch of the mercantile law, which has found it necessary to disregard the point of consideration in respect to instruments *230 negotiable in their nature and essential to the interests of commerce.

Instead of citing a multiplicity of cases to support the positions I have taken, I will only refer to a very able review of all the cases in the note in 3 Bos. & Pul. 249. The opinions of the judges had been variant for a long course of years upon this subject, but there seems to be no case in which it was nakedly decided, that a promise to pay the debt of a son of full age, not living with his father, though the debt were incurred by sickness which ended in the death of the son, without a previous request by the father proved or presumed, could be enforced by action.

It has been attempted to show a legal obligation on the part of the defendant by virtue of our statute, which compels lineal kindred in the ascending or descending line to support such of their poor relations as are likely to become chargeable to the town where they have their settlement. But it is a sufficient answer to this position, that such legal obligation does not exist except in the very cases provided for in the statute, and never until the party charged has been adjudged to be of sufficient ability thereto. We do not know from the report any of the facts which are necessary to create such an obligation. Whether the deceased had a legal settlement in this commonwealth at the time of his death, whether he was likely to become chargeable had he lived, whether the defendant was of sufficient ability, are essential facts to be adjudicated by the court to which is given jurisdiction on this subject. The legal liability does not arise until these facts have all been ascertained by judgment, after hearing the party intended to be charged.

For the foregoing reasons we are all of opinion that the nonsuit directed by the Court of Common Pleas was right, and that judgment be entered thereon for costs for the defendant.

Upon that authority, the judgment is affirmed.

Affirmed.

ANDERSON, C. J., and BOULDIN and FOSTER, JJ., concur.

WEBB v. McGOWIN et al.

3 Div. 768.

Court of Appeals of Alabama.

Nov. 12, 1935.

Rehearing Denied Feb. 18, 1936.

1. Contracts ⇐79

Where workman clearing upper floor of mill started to turn block loose so that it would drop to ground but saw deceased on ground where block would have fallen and to divert course of its fall workman fell with it sustaining injuries causing permanent disability, deceased's agreement to compensate workman *held* valid and supported by consideration.

2. Contracts ⇐76

Moral obligation is sufficient consideration to support subsequent promise to pay where promisor has received material benefit, although there was no original duty or liability resting on promisor.

3. Contracts ⇐50

Benefit to promisor or injury to promisee is sufficient consideration for promisor's agreement to pay.

4. Frauds, statute of ⇐50(2)

Promisor's oral agreement to pay promisee $15 every two weeks during promisee's life for having saved promisor from death or grievous bodily injury *held* not void under statute of frauds (Code 1923, § 8034).

Appeal from Circuit Court, Butler County; A. E. Gamble, Judge.

Action by Joe Webb against N. Floyd McGowin and Joseph F. McGowin, as executors of the estate of J. Greeley McGowin, deceased. From a judgment of nonsuit, plaintiff appeals.

Reversed and remanded.

Certiorari denied by Supreme Court in Webb v. McGowin (3 Div. 170) 168 So. 199.

Powell & Hamilton, of Greenville, for appellant.

Calvin Poole, of Greenville, for appellee.

BRICKEN, Presiding Judge.

This action is in assumpsit. The complaint as originally filed was amended. The demurrers to the complaint as amended were sustained, and because of this adverse ruling by the court the plaintiff took a nonsuit, and the assignment of errors on this appeal are predicated upon said action or ruling of the court.

A fair statement of the case presenting the questions for decision is set out in appellant's brief, which we adopt.

"On the 3d day of August, 1925, appellant while in the employ of the W. T. Smith Lumber Company, a corporation, and acting within the scope of his employment, was engaged in clearing the upper floor of mill No. 2 of the company. While so engaged he was in the act of dropping a pine block from the upper floor of the mill to the ground below; this being the usual and ordinary way of clearing the floor, and it being the duty of the plaintiff in the course of his employment to so drop it. The block weighed about 75 pounds.

"As appellant was in the act of dropping the block to the ground below, he was on the edge of the upper floor of the mill. As he started to turn the block loose so that it would drop to the ground, he saw J. Greeley McGowin, testator of the defendants, on the ground below and directly under where the block would have fallen had appellant turned it loose. Had he turned it loose it would have struck McGowin with such force as to have caused him serious bodily harm or death. Appellant could have remained safely on the upper floor of the mill by turning the block loose and allowing it to drop, but had he done this the block would have fallen on McGowin and caused him serious injuries or death. The only safe and reasonable way to prevent this was for appellant to hold to the block and divert its direction in falling from the place where McGowin was standing and the only safe way to divert it so as to prevent its coming into contact with McGowin was for

appellant to fall with it to the ground below. Appellant did this, and by holding to the block and falling with it to the ground below, he diverted the course of its fall in such way that McGowin was not injured. In thus preventing the injuries to McGowin appellant himself received serious bodily injuries, resulting in his right leg being broken, the heel of his right foot torn off and his right arm broken. He was badly crippled for life and rendered unable to do physical or mental labor.

"On September 1, 1925, in consideration of appellant having prevented him from sustaining death or serious bodily harm and in consideration of the injuries appellant had received, McGowin agreed with him to care for and maintain him for the remainder of appellant's life at the rate of $15 every two weeks from the time he sustained his injuries to and during the remainder of appellant's life; it being agreed that McGowin would pay this sum to appellant for his maintenance. Under the agreement McGowin paid or caused to be paid to appellant the sum so agreed on up until McGowin's death on January 1, 1934. After his death the payments were continued to and including January 27, 1934, at which time they were discontinued. Thereupon plaintiff brought suit to recover the unpaid installments accruing up to the time of the bringing of the suit.

"The material averments of the different counts of the original complaint and the amended complaint are predicated upon the foregoing statement of facts."

In other words, the complaint as amended averred in substance: (1) That on August 3, 1925, appellant saved J. Greeley McGowin, appellee's testator, from death or grievous bodily harm; (2) that in doing so appellant sustained bodily injury crippling him for life; (3) that in consideration of the services rendered and the injuries received by appellant, McGowin agreed to care for him the remainder of appellant's life, the amount to be paid being $15 every two weeks; (4) that McGowin complied with this agreement until he died on January 1, 1934, and the payments were kept up to January 27, 1934, after which they were discontinued.

The action was for the unpaid installments accruing after January 27, 1934, to the time of the suit.

The principal grounds of demurrer to the original and amended complaint are: (1) It states no cause of action; (2) its averments show the contract was without consideration; (3) it fails to allege that McGowin had, at or before the services were rendered, agreed to pay appellant for them; (4) the contract declared on is void under the statute of frauds.

[1] 1. The averments of the complaint show that appellant saved McGowin from death or grievous bodily harm. This was a material benefit to him of infinitely more value than any financial aid he could have received. Receiving this benefit, McGowin became morally bound to compensate appellant for the services rendered. Recognizing his moral obligation, he expressly agreed to pay appellant as alleged in the complaint and complied with this agreement up to the time of his death; a period of more than 8 years.

Had McGowin been accidentally poisoned and a physician, without his knowledge or request, had administered an antidote, thus saving his ife, a subsequent promise by McGowin to pay the physician would have been valid. Likewise, McGowin's agreement as disclosed by the complaint to compensate appellant for saving him from death or grievous bodily injury is valid and enforceable.

Where the promisee cares for, improves, and preserves the property of the promisor, though done without his request, it is sufficient consideration for the promisor's subsequent agreement to pay for the service, because of the material benefit received. Pittsburg Vitrified Paving & Building Brick Co. v. Cerebus Oil Co., 79 Kan. 603, 100 P. 631; Edson v. Poppe, 24 S.D. 466, 124 N.W. 441, 26 L.R.A.(N.S.) 534; Drake v. Bell, 26 Misc. 237, 55 N.Y.S. 945.

In Boothe v. Fitzpatrick, 36 Vt. 681, the court held that a promise by defendant to pay for the past keeping of a bull which had escaped from defendant's premises and been cared for by plaintiff was valid, although there was no previous request, because the subsequent promise obviated that objection; it being equivalent to a previous request. On the same principle, had the promisee saved the promisor's life or his body from grievous harm, his subsequent promise to pay for the services rendered would have been valid. Such service would have been far more material than caring for his bull. Any holding that saving a man from death or grievous bodily harm is not a material benefit sufficient to uphold a subsequent promise to

pay for the service, necessarily rests on the assumption that saving life and preservation of the body from harm have only a sentimental value. The converse of this is true. Life and preservation of the body have material, pecuniary values, measurable in dollars and cents. Because of this, physicians practice their profession charging for services rendered in saving life and curing the body of its ills, and surgeons perform operations. The same is true as to the law of negligence, authorizing the assessment of damages in personal injury cases based upon the extent of the injuries, earnings, and life expectancies of those injured.

In the business of life insurance, the value of a man's life is measured in dollars and cents according to his expectancy, the soundness of his body, and his ability to pay premiums. The same is true as to health and accident insurance.

It follows that if, as alleged in the complaint, appellant saved J. Greeley McGowin from death or grievous bodily harm, and McGowin subsequently agreed to pay him for the service rendered, it became a valid and enforceable contract.

[2] 2. It is well settled that a moral obligation is a sufficient consideration to support a subsequent promise to pay where the promisor has received a material benefit, although there was no original duty or liability resting on the promisor.. Lycoming County v. Union County, 15 Pa. 166, 53 Am.Dec. 575, 579, 580; Ferguson v. Harris, 39 S.C. 323, 17 S.E. 782, 39 Am.St.Rep. 731, 734; Muir v. Kane, 55 Wash. 131, 104 P. 153, 26 L.R.A.(N.S.) 519, 19 Ann.Cas. 1180; State ex rel. Bayer v. Funk, 105 Or. 134, 199 P. 592, 209 P. 113, 25 A.L.R. 625, 634; Hawkes v. Saunders, 1 Cowp. 290; In re Sutch's Estate, 201 Pa. 305, 50 A. 943; Edson v. Poppe, 24 S.D. 466, 124 N.W. 441, 26 L.R.A.(N.S.) 534; Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516, 79 A.L.R. 1339; Baker v. Gregory, 28 Ala. 544, 65 Am.Dec. 366. In the case of State ex rel. Bayer v. Funk, supra, the court held that a moral obligation is a sufficient consideration to support an executory promise where the promisor has received an actual pecuniary or material benefit for which he subsequently expressly promised to pay.

The case at bar is clearly distinguishable from that class of cases where the consideration is a mere moral obligation or conscientious duty unconnected with receipt by promisor of benefits of a material or pecuniary nature. Park Falls State Bank v. Fordyce, supra. Here the promisor received a material benefit constituting a valid consideration for his promise.

3. Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor, having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmance or ratification of the services rendered carrying with it the presumption that a previous request for the service was made. McMorris v. Herndon, 2 Bailey (S.C.) 56, 21 Am.Dec. 515; Chadwick v. Knox, 31 N.H. 226, 64 Am.Dec. 329; Kenan v. Holloway, 16 Ala. 53, 50 Am.Dec. 162; Ross v. Pearson, 21 Ala. 473.

Under the decisions above cited, McGowin's express promise to pay appellant for the services rendered was an affirmance or ratification of what appellant had done raising the presumption that the services had been rendered at McGowin's request.

[3] 4. The averments of the complaint show that in saving McGowin from death or grievous bodily harm, appellant was crippled for life. This was part of the consideration of the contract declared on. McGowin was benefited. Appellant was injured. Benefit to the promisor or injury to the promisee is a sufficient legal consideration for the promisor's agreement to pay. Fisher v. Bartlett, 8 Greenl. (Me.) 122, 22 Am.Dec. 225; State ex rel. Bayer v. Funk, supra.

5. Under the averments of the complaint the services rendered by appellant were not gratuitous. The agreement of McGowin to pay and the acceptance of payment by appellant conclusively shows the contrary.

[4] 6. The contract declared on was not void under the statute of frauds (Code 1923, § 8034). The demurrer on this ground was not well taken. 25 R.C.L. 456, 457 and 470, § 49.

The cases of Shaw v. Boyd, 1 Stew. & P. 83, and Duncan v. Hall, 9 Ala. 128, are not in conflict with the principles here announced. In those cases the lands were owned by the United States at the time the alleged improvements were made, for which subsequent purchasers from the government agreed to pay. These subsequent purchasers were not the owners of the lands at the time the improvements were made. Consequently, they could not have been made for their benefit.

From what has been said, we are of the opinion that the court below erred in the ruling complained of; that is to say, in sustaining the demurrer, and for this error the case is reversed and remanded.

Reversed and remanded.

SAMFORD, Judge (concurring).

The questions involved in this case are not free from doubt, and perhaps the strict letter of the rule, as stated by judges, though not always in accord, would bar a recovery by plaintiff, but following the principle announced by Chief Justice Marshall in Hoffman v. Porter, Fed. Cas. No. 6,577, 2 Brock. 156, 159, where he says, "I do not think that law ought to be separated from justice, where it is at most doubtful," I concur in the conclusions reached by the court.

WEBB v. McGOWIN et al.

3 Div. 170.

Supreme Court of Alabama.

May 14, 1936.

Contracts ⇐76

Moral obligation is sufficient consideration to support subsequent promise to pay if promisor, rather than his estate, has received material and substantial benefit, in which case promisor has privilege of compensating by executed payment or executory promise to pay, especially when compensation is not only for benefits which promisor has received, but also for injuries to property or person of promisee by reason of service rendered.

Certiorari to Court of Appeals.

Petition of N. Floyd McGowin and Joseph F. McGowin, as executors of the estate of J. Greeley McGowin, deceased, for certiorari to the Court of Appeals to review and revise the judgment and decision of that court in Joe Webb v. McGowin, et al. Ex'rs, 168 So. 196.

Writ denied.

Calvin Poole, of Greenville, for petitioners.

Powell & Hamilton, of Greenville, for respondent.

FOSTER, Justice.

We do not in all cases in which we deny a petition for certiorari to the Court of Appeals approve the reasoning and principles declared in the opinion, even though no opinion is rendered by us. It does not always seem to be important that they be discussed, and we exercise a discretion in that respect. But when the opinion of the Court of Appeals asserts important principles or their application to new situations, and it may be uncertain whether this court agrees with it in all respects, we think it advisable to be specific in that respect when the certiorari is denied. We think such a situation here exists.

Neither this court nor the Court of Appeals has had before it questions similar to those here presented, though we have held that the state may recognize a moral obligation, and pay it or cause it to be paid by a county, or city. State v. Clements, 220 Ala. 515, 126 So. 162; Board of Revenue of Mobile v. Puckett, 227 Ala. 374, 149 So. 850; Board of Revenue of Jefferson County v. Hewitt, 206 Ala. 405 (6), 90 So. 781; Moses v. Tigner (Ala. Sup.) 168 So. 194.

Those cases do not mean to affirm that the state may recompense for nice ethical obligations, or do the courteous or generous act, without a material and substantial claim to payment, though it is not enforceable by law; nor that an executory obligation may be so incurred.

The opinion of the Court of Appeals here under consideration recognizes and applies the distinction between a supposed moral obligation of the promisor, based upon some refined sense of ethical duty, without material benefit to him, and one in which such a benefit did in fact occur. We agree with that court that if the bene-

⇐For other cases see same topic and KEY NUMBER in all Key Number Digests and Indexes

fit be material and substantial, and was to the person of the promisor rather than to his estate, it is within the class of material benefits which he has the privilege of recognizing and compensating either by an executed payment or an executory promise to pay. The cases are cited in that opinion. The reason is emphasized when the compensation is not only for the benefits which the promisor received, but also for the injuries either to the property or person of the promisee by reason of the service rendered.

Writ denied.

ANDERSON, C. J., and GARDNER and BOULDIN, JJ., concur.

NEW YORK LIFE INS. CO. v. ELLIS.

6 Div. 915.

Court of Appeals of Alabama.

Feb. 11, 1936.

Rehearing Denied March 3, 1936.

1. Insurance ⇐365(1)

Statute providing that no misrepresentation in application for insurance or proof of loss thereunder shall void policy unless misrepresentation increases risk of loss, or is made with actual intent to deceive, *held* applicable to application for reinstatement of life policy (Code 1923, § 8364).

2. Insurance ⇐668(7)

Whether misrepresentation of applicant's health in application for reinstatement of life policy increased risk of loss or was made with actual intent to deceive, *held* for jury (Code 1923, § 8364).

3. Insurance ⇐400

Incontestable provision in life policy *held* not to preclude plea of fraud in procurement of reinstatement contract, since insurer's liability under original contract depended upon validity of reinstatement contract (Code 1923, § 8364).

Appeal from Circuit Court, Walker County; Ernest Lacy, Judge.

Action to recover disability benefits under a policy of life insurance by Radford H. Ellis against the New York Life Insurance Company. From a judgment for plaintiff, defendant appeals.

Affirmed.

Certiorari denied by Supreme Court in New York Life Ins. Co. v. Ellis (6 Div. 944) 168 So. 203.

W. W. Bankhead, of Jasper, and Stokely, Scrivner, Dominick & Smith, of Birmingham, for appellant.

Pennington & Tweedy, of Jasper, for appellee.

SAMFORD, Judge.

The plaintiff in three counts claims of the defendant a monthly sick benefit under the terms of a life insurance policy issued by the defendant on the 29th day of August, 1923, by the terms of which the defendant agreed to pay to the plaintiff $20 per month and also to waive the payment of premiums if plaintiff becomes wholly and permanently disabled before the age of 60, subject to all the terms and conditions contained in the policy and not here necessary to be set out, except in so far as they may follow in this opinion.

The plaintiff continued to pay the annual premium upon said policy and to comply with all the conditions named therein until the month of August, 1929, when he permitted the policy to lapse for and on account of a nonpayment of the premium.

By the terms of the policy, among other provisions, there is a clause which reads as follows: "At any time within five years after any default, upon written application by the insured and upon presentation at the home office of evidence of insurability satisfactory to the company, this policy may be reinstated together with any indebtedness in accordance with the loan provisions of the policy, upon payment of loan, interest, and of arrears of premium with 5% interest thereon from their due date."

On October 22, 1929, in accordance with the reinstatement clause hereinabove set out, this plaintiff applied for a reinstatement upon a form furnished him by the defendant in which the plaintiff stated that he had not within the past 12 months had any illness or consulted or been treated by any physician or physicians. This application was forwarded to the company, and, based

of the principal for a distinct and separate offense. We think it clear that sec. 353.06, Stats., very definitely settles this principle. We are of the view that the court erred in sustaining defendant's plea in abatement to the counts of the information in which defendant was charged with being an accessory before the fact, that is, as to counts 2, 3, 4, 8, 9, and 10 of the information.

[6] Clearly the court erred in sustaining the pleas in abatement as to counts 5, 6, and 7 in which defendant was charged as a principal with Carter as to the embezzlements. In counts 5, 6, and 7 defendant was charged with embezzlement and fraudulent conversion as principal. The offense in each count is alleged to have been committed in cooperation with Carter. However, Carter was not made a co-defendant. Defendant Hess was informed against separately and was put upon a separate trial. In the following cases it has been held that even in cases of parties jointly indicted for a crime in which they were alleged to have acted in concert that the acquittal of one is no bar to the conviction of the other: People v. Marcus, 1931, 253 Mich. 410, 235 N.W. 202; People v. Simon, 1926, 218 App.Div. 363, 218 N.Y.S. 297; Studer v. State, 29 Ohio Cir.Ct.R. 33, affirmed 1906, 74 Ohio St. 519, 78 N.E. 1139 (mem); Williams v. Commonwealth, 1889, 85 Va. 607, 8 S.E. 470; Goforth v. State, 1886, 22 Tex.App. 405, 3 S.W. 332; State v. Orr, 1876, 64 Mo. 339; State v. Caldwell, 1876, 8 Baxt., Tenn., 576.

[7] Defendant makes the further point that the prosecution was commenced by a complaint and a warrant entitled State of Wisconsin v. Albert J. Hess and Lester A. Carter and that thereafter the prosecution proceeded under separate informations and separate trials. It is true that the original complaint filed with the justice of the peace was against both Hess and Carter and contained eighteen separate counts to all of which each entered a plea of not guilty and waived preliminary examination. Thereafter, upon the separate trials, the prosecution filed an information against Carter containing six counts, all of which were in the original eighteen counts of the complaint made to the justice of the peace and in the warrant of arrest. Also, when the case against defendant Hess came on for separate trial, the prosecution filed an information against him containing ten of the original counts made to the justice of the peace and in his warrant of arrest. There is no merit in the contention that defendant did not have a preliminary examination on the charges contained in the ten counts of the information filed against him. He waived his preliminary examination.

We conclude that the order of the court sustaining defendant's plea in abatement must be reversed and an order entered overruling the plea in abatement and for further proceedings according to law.

Order reversed and record remanded with directions that an order be entered overruling defendant's plea in abatement and for further proceedings according to law.

In re HATTEN'S ESTATE.

FIRST WISCONSIN TRUST CO. v. MONSTED.

Supreme Court of Wisconsin.

Nov. 7, 1939.

Rehearing Denied Jan. 16, 1940.

1. Evidence ⇐596(2)
Fraud ⇐58(1)

In civil action, burden rests on one alleging fraud, crime, criminal conduct, or conspiracy to prove such allegations by clear and satisfactory evidence, by such evidence to reasonable certainty, or by clear, satisfactory and convincing evidence.

2. Appeal and error ⇐1012(1)

On appeal to Supreme Court, trial court's fact finding, assailed by appellant, will be upheld, unless it is against great weight and clear preponderance of evidence.

3. Appeal and error ⇐1011(1)

Whether note, for amount of which payee filed claim against decedent's estate, was signed by decedent, and interlineation of words, "To be taken from my estate," was in his handwriting, were fact questions for trial court on conflicting evidence.

4. Appeal and error ⇐994(3), 1012(1)

It is not within Supreme Court's province on appeal to pass on witnesses' credibility or weight of evidence, as such questions are for trial court.

5. Executors and administrators ⇐221(9)

Evidence *held* sufficient to warrant trial court's finding that signature of note, for amount of which payee filed claim against decedent's estate, and interlineation of words, "To be taken from my estate," were in decedent's handwriting.

6. Executors and administrators ⇐221(9)

Evidence *held* sufficient to warrant trial court's finding that decedent was mentally competent to give note, for amount of which payee filed claim against estate, at time of executing it.

7. Bills and notes ⇐452(3)

A note not supported by consideration is subject to defense of no consideration as between parties thereto and against one who is not holder thereof in due course. St.1937, § 116.33.

8. Bills and notes ⇐493(3), 518(1)

Every negotiable instrument is deemed prima facie to have been issued for valuable consideration, and burden on one asserting want of consideration therefor to show such want is same or as great as that of establishing mistake, which must be clearly and satisfactorily proved to reform written instrument on such ground. St.1937, §§ 116.29, 116.30.

9. Executors and administrators ⇐221(9)

Evidence *held* sufficient to warrant trial court's finding that note, for amount of which payee filed claim against deceased maker's estate, was supported by valuable consideration of services, meals and transportation furnished decedent by claimant.

10. Executors and administrators ⇐256(6)

The credibility and weight of testimony of one prosecuting claim against decedent's estate for amount of note, alleged to have been executed by decedent in consideration of services, meals, etc., furnished him by claimant, were for trial court's determination.

11. Contracts ⇐51, 76

Promisor's receipt of actual benefit will support executory promise, and moral consideration may be sufficient to support such promise, where promisor originally received from promisee something of value sufficient to arouse a moral, as distinguished from legal, obligation.

It has been held that a "consideration" may consist of a benefit to the promisor or a detriment to the promisee.

[Ed. Note.—For other definitions of "Consideration," see Words & Phrases.]

12. Executors and administrators ⇐221(9)

Evidence *held* sufficient to support trial court's findings that decedent was not susceptible to undue or improper influence at time of executing note payable to one filing claim against estate for amount thereof, that making, execution and delivery of note did not indicate or evidence exercise of undue influence over decedent by claimant, and that note was decedent's free act and deed.

13. Executors and administrators ⇐227(6)

The pleading of claim against decedent's estate on decedent's note, providing for payment of attorney's fees by maker if placed in attorney's hands for collection and suit, was sufficient to permit claimant's recovery of such fee, where claim was contested, though note was not filed with court within nonclaim period and claim filed within such period did not make note part thereof nor specifically incorporate terms concerning payment of attorney's fees.

14. Executors and administrators ⇐256(6)

In proceeding on claim against decedent's estate for amount of note given claimant by decedent, fact issues were peculiarly for determination by county court.

FOWLER, J., dissenting.

Appeal from a judgment of the County Court of Waupaca County; A. M. Scheller, Judge.

Affirmed.

On August 4, 1937, Beatrice E. Monsted duly filed two claims against the estate of William H. Hatten, also known as Wm. H. Hatton, deceased. One claim was for the principal and interest asserted to be due on a certain promissory note in the amount of $25,000, dated January 21, 1937, payable one year after date, with interest at the rate of five per cent per annum. The other claim was for services rendered, money loaned and board and lodging furnished, to the decedent at his special instance and request from the year 1931 to the date of his death, for which the decedent promised to pay, all of the reasonable value of $6,000. The First Wisconsin Trust Company, administrator, objected to the allowance of both claims. It objected to the first mentioned claim for the following reasons: (a) the note was given without consideration, (b)

the note is void if claimed to be an attempted testamentary gift by the deceased, and (c) the note does not state an unconditional promise to pay a sum certain in money. It objected to the other claim for the reason that the decedent was not, at the time of his death, indebted to the claimant either for services rendered, money loaned or board and lodging furnished to the decedent. Thereafter formal pleadings were prepared and filed. It was alleged in the complaint as to the first mentioned claim, that on January 21, 1937, William H. Hatten, for a valuable consideration, executed and delivered to the claimant his certain promissory note in writing wherein and whereby he promised to pay to her the sum of $25,000 one year after date, with interest at the rate of five per cent per annum, and that no part of said note had been paid. As to the other claim, it was alleged that the claimant rendered services, loaned money and furnished board and lodging to the said William H. Hatten, at his special instance and request, for which he promised to pay the reasonable value thereof, and that such services, etc., were of the reasonable value of $6,000, no part of which had been paid. The administrator answered the claimant's complaint and thereafter served an amended answer in which in substance it denied having any knowledge or information sufficient to form a belief as to whether the decedent executed and delivered the said promissory note, denied upon information and belief that the said note, if signed by decedent, was for a valuable consideration, denied, upon information and belief, that any sum was due or owing to the claimant on account of said note from the estate, alleged upon information and belief, that at the time said note is alleged to have been executed and delivered by decedent, he was mentally incompetent, incapable of conducting a transaction involving the giving of a note of the character alleged in the complaint; all of which the claimant then and there well knew; that if said note was in fact executed and delivered by decedent it was obtained by unlawful and undue influence exerted over him by the claimant and was not executed or delivered by him as his own free act and deed. The administrator denied, upon information and belief, that the claimant had rendered services, loaned money or furnished board or lodging to the decedent or that decedent requested any such services, loans or board and lodging or promised to pay for same and denied, upon information and belief, that the estate of said decedent was indebted to the claimant in the sum of $6,000 or in any sum on account of the matters alleged in the complaint. Trial was had to the court on June 2nd, 3rd, 4th, 13th, 14th and 26th. During the early stages of the trial, the quantum meruit claim was abandoned and the trial proceeded on the claim founded upon the note. The issues presented were vigorously contested. Some time after the conclusion of the trial, written briefs were submitted to the court. On March 13, 1939, the court filed its decision. In its decision the court recited the facts as it found them to be and concluded: that the signature to the note was genuine; that the decedent, at the time of executing and delivering the note to the claimant, was competent; that there was adequate consideration to support it and that the claim based upon the note, together with interest and attorneys' fees, was a valid claim against the estate. Formal findings of fact and conclusions of law were thereafter made and judgment entered on April 1, 1939. From that judgment the administrator appealed. Other facts, necessary to an understanding of the several controverted issues, will be stated in the opinion.

Miller, Mack & Fairchild, of Milwaukee, and Brazeau & Graves, of Wisconsin Rapids, for appellant.

Benton, Bosser, Becker & Parnell, of Appleton (David L. Fulton, of Appleton, of counsel), for respondent.

NELSON, Justice.

The administrator contends that the court erred in finding that the note was in fact signed by decedent or that any part of it was in his handwriting; in finding that at the time the note was alleged to have been given, decedent was competent to conduct the transaction or to give the note alleged to have been given; in finding a valuable consideration sufficient to support the note and that the note, if executed and delivered by decedent, was given for those considerations; in finding that the note, if given, was not the result of undue influence exercised by claimant over decedent; and in finding that the claimant was entitled to attorneys' fees and the amount awarded her. The administrator further contends that the court erred in concluding that the claimant was entitled to any judgment.

The following facts are not in dispute: The claimant is sixty-four years of age, and has been a resident of New London for twenty-seven years. She is the widow of John Winfield Monsted, a physician who practiced his profession in the city of New London for many years prior to his death, which occurred in 1932. The claimant has two sons, Robert Monsted, aged thirty-five, who owns and operates a resort at Lake Poygan in this state, during the summer months and lives with his mother, the claimant, during the winter months. John W. Monsted, her other son, is a physician who has practiced his profession in the city of New London for about eleven years.

William H. Hatten, prior to his death, which occurred on March 30, 1937, was extensively engaged as a lumberman in this state and in the south. He resided in New London during the greater part of his life. He was very successful in the lumber business and was public spirited and interested in education and politics. At the time of his death he was a member of the boards of trustees of Ripon and Lawrence colleges. Mr. Hatten never married and for many years prior to his death, lived at the Elwood Hotel in New London. He left an estate, which was appraised at over three million dollars. Mr. Hatten was not related by blood or marriage to the claimant or to any member of her family.

It is not disputed that close friendly relations existed between Mr. Hatten and the claimant and her family for more than twenty-five years. During all of those years he frequently was invited to the Monsted home and often went there without formal invitation, where he was given meals and where he enjoyed the companionship of the Monsteds and the privileges of their home. During the years immediately preceding his death his visits to the Monsted home became more frequent. During the last two years preceding his death, when he was in New London, he was at the claimant's home for meals, three or four times a week. In many respects, he treated the Monsted home as though it were his own. Mr. Hatten neither owned nor drove an automobile. On many occasions he was transported in the Monsted automobile to Appleton and to other cities and places. Many of these trips were made at his specific request and for them the claimant received no compensation. Many times, without invitation, he would go to the Monsted home at regular meal times and many times after such meal time was past and was furnished meals which he seemed to enjoy.

The claimant testified that on numerous occasions Mr. Hatten expressed his appreciation to her for all that she had done for him and stated that some day she would be paid well for such services. Two specific instances of such promises were detailed by the claimant. At one time he said to her: "What you are doing for me you will be well paid for it," and on another occasion, in the presence of her son, similarly expressed himself. After carefully reading the testimony, it cannot be doubted that during many years Mr. Hatten was often invited to the Monsted home and always felt free to go there without invitation, to enjoy the privileges of that home, to be transported in the Monsted automobile on both business and pleasure trips and all without compensation or the reciprocal giving or furnishing of meals.

Upon the trial, after the note was introduced in evidence, accompanied by testimony that no part of it had been paid, and the amount of the accrued interest, the claimant rested, reserving, however, the right to offer rebuttal testimony. The administrator then called the claimant adversely and examined her at some length. Her testimony thus elicited by the administrator was in substance that Mr. Hatten had signed the note at her house on a form furnished by her to him pusuant to his request; that at that time she and Mr. Hatten were alone in her library, which was just off the living room; that she filled out part of the blank spaces in the note, i. e., "Jan. 21, 7," "One year," "Beatrice E. Monsted," "Twenty-five thousand 00/100," and that the words "To be taken from my estate," were in the handwriting of Mr. Hatten and written at the time he signed the note; that she loaned him no money on that day and that she entered into no contract with him on that day except what might be expressed in the note.

The circumstances surrounding the execution of the note, as testified to by the claimant, are substantially as follows. On January 21, 1937, Mr. Hatten came to her home between twelve and one o'clock in the afternoon and had lunch there. He had not been invited to the Monsted home on that occasion. After lunch the claimant and Mr. Hatten went into the library and after a while Mr. Hatten said: "Let's fin-

ish up that note." He drew from his pocket a note form upon which he had written "Mrs. J. Monsted." The claimant said to him: "Why not write in Beatrice E. Monsted because my son's wife's name is Mrs. J. Monsted as well as my own?" He said: "Have you another blank?" She said she had and took from her desk a blank note form which she had left over from administering her husband's estate and handed it to him. He handed it back to her saying: "You write in your name and the date." This she did. Mr. Hatten then said: "Write in $25,000." Claimant said: "My, isn't that a lot of money?" He replied: "Well, it isn't for what you have done for me and what the privileges in your home have meant to me. It means so much to me, what you have done for me and the privilege of coming to your home and what your family have done for me."

He then told her to write in the interest rate at 5%. After she had done that he sat down at the desk and took up her pen. It was a fountain pen and somewhat stiff and did not work very well. After a time he succeeded in making the ink flow and signed his name to the note. Mr. Hatten then stated: "Now this is my obligation. I want you to come to me. The Hatten Lumber Company has nothing to do with this." The claimant replied: "Why don't you write in something to that effect?" Mr. Hatten drew an envelope from his pocket and after writing on it for a time, wrote on the note these words: "To be taken from my estate" and handed it to the claimant. The note is a judgment note which reads as follows:

"New London, Wis., Jan. 21, 1937.

"One year after date, I, we, each and severally promise to pay to the order of Beatrice E. Monsted at New London, Wis., Twenty-five Thousand 00/100 Dollars, Value received, with interest at 5 per cent, per annum, until paid the makers, guarantors and endorsers hereof waive demand notice of non-payment, protest and notice of protest. And agree to pay all attorneys fees and costs if placed in hands of an attorney for collection or for suit. (Authorization to any attorney to confess judgment, omitted.)"

"To be taken from my estate.

"Wm. H. Hatton."

The words and figures "Jan. 21," "7", "one year," "Beatrice E. Monsted," "Twenty-five Thousand 00/100," and "5" were concededly in the handwriting of the claimant. According to her testimony, the words "To be taken from my estate," and the signature "Wm. H. Hatton," were written by Mr. Hatten.

We shall content ourselves with this preliminary statement and shall proceed to consider the several contentions of the administrator. In considering those contentions, we shall briefly recite the relevant evidence adduced by the parties. We shall consider them in the order followed by the trial court.

[1] The administrator contends that the trial court erred in finding that the note was in fact signed by Mr. Hatten or that any part of it was in his handwriting. This contention assails the findings of the trial court that the interlineation: "To be taken from my estate," and the signature, "Wm. H. Hatton," were in the handwriting of Mr. Hatten. While the administrator, in its amended answer, only denied having any knowledge or information sufficient to form a belief that the decedent executed and delivered the note, it adduced testimony tending to prove that the signature of Mr. Hatten was a forgery and the words, "To be taken from my estate," were not written by him. The administrator, therefore, charged and obviously attempted to prove that the signature to the note was a forgery. In civil actions, where fraud, crime, criminal conduct or conspiracy is alleged, the burden rests upon him who so charges, to establish the proof of such allegations by clear and satisfactory evidence, Max L. Bloom Co. v. United States Casualty Co., 191 Wis. 524, 210 N.W. 689; Muska v. Apel, 203 Wis. 389, 232 N.W. 593; or by the clear and satisfactory evidence to a reasonable certainty, Lange v. Heckel, 171 Wis. 59, 175 N.W. 788, or by clear, satisfactory and convincing evidence. Parker v. Hull, 71 Wis. 368, 37 N.W. 351, 5 Am. St.Rep. 224; Milonczyk v. Farmers Mutual Fire Ins. Co., 200 Wis. 255, 227 N.W. 873.

[2] Upon appeal to this court, when a finding of fact is assailed, the finding of the trial court will be upheld unless it is against the great weight and clear preponderance of the evidence.

[3, 4] The administrator produced John F. Tyrrell, an examiner and photographer of questioned documents. He had examined many signatures of Mr. Hatten which were concededly genuine and other authentic writings of Mr. Hatten. He enumerated many ways in which in his opinion the

signature to the note and the interlineation "To be taken from my estate" differed from the "standards," the genuine writings of Mr. Hatten, and finally expressed his conclusion that Mr. Hatten neither wrote the signature nor the interlineation. We deem it unnecessary to review his testimony at length or to point out the many reasons for his conclusion. His testimony as an expert was entitled to and no doubt given careful consideration by the trial court. However, his testimony was expert in character and obviously not conclusive. The claimant, on the other hand, testified that she saw Mr. Hatten sign the note and saw him write the interlineation. Mr. E. H. Becker, who had been assistant cashier of the First National Bank of Oshkosh for more than thirty years and who, for a good share of that time, had been a teller at that bank, at which Mr. Hatten had done business, testified that he would pay Mr. Hatten's check for $25,000 on that signature; that if it was on a blank check that did not contain his name, he would, in accordance with banking custom, not cash it. George W. Schwartz, an examiner of questioned documents, was produced by the claimant. He likewise had compared the signature on the note with other genuine signatures of Mr. Hatten, had made photographs and photographic enlargements thereof in his laboratory in Chicago, and testified to his conclusion that the numerous genuine signatures and the signatures to the note were in the handwriting of one and the same person. We think it clear, that in this state of the record, it must be said that a plain question of fact was presented and that the credibility of the witnesses and the weight to be given their testimony was for the trial court. While the administrator makes a persuasive argument, based upon the testimony of Mr. Tyrrell, it is not within our province to pass upon the credibility of the witnesses or the weight of the evidence. If the trial court, who saw the claimant upon the stand and observed her manner of testifying, was right in deeming her testimony credible, then obviously the signature to the note was not a forgery.

In the recent case of Will of Miller, 201 Wis. 148, 229 N.W. 656, 657, the following was quoted with approval from Estate of Johnson, 170 Wis. 436, 175 N.W. 917:

"'* * * The positive testimony of witnesses whose integrity and credibility is otherwise unassailed is not outweighed or overcome by the testimony of handwriting experts who express opinions only. The testimony of honest witnesses, who state that they know what they testify to, is more convincing than theory.'"

[5] Having in mind the rule as to the burden of proof hereinbefore stated and the rule which requires us to uphold the findings of a trial court if not against the great weight and clear preponderance of the evidence, we conclude that the finding of the trial court that both the signature and the interlineation are in the handwriting of Mr. Hatten, should not be disturbed.

[6] The administrator next contends, assuming for the purposes of argument that the note was signed by Mr. Hatten, that he was, on January 21, 1937, incompetent to carry through a transaction such as claimant described or to give a note such as is pleaded. The trial court found that at the time of the execution and delivery of said note on January 21, 1937, the deceased was competent to and did in fact understand and comprehend the nature and effect of said transaction. Here again is a finding as to a plain question of fact, which under the rule, may not be disturbed unless against the great weight and clear preponderance of the evidence. On this branch of the case, the testimony is voluminous and no attempt will be made fully to review it. Mr. Hatten, at the time of his death on March 30, 1937, was in his eighty-first year. It is contended by the estate that the real break between his competency and incompetency occurred on February 12, 1935, when he fell or collapsed in the middle of an icy street in the city of Appleton. Whether he had some sort of a stroke, or sustained injury as a result of a fall, does not clearly appear from the testimony; he was mentally confused for some time thereafter. The administrator contends that the evidence shows that after that fall he rapidly became senile and at times mentally deficient, unable to carry on a sustained conversation or to transact with understanding any business; that he became careless in his dress, penurious in his habits, unable at times to sense where he was even while on the streets of New London; that he was subject to delusions and hallucinations, at times became confused in many ways and lost the ability to remember names, faces, familiar places or routes with which he had formerly been thoroughly familiar. Much of the testimony describing Mr. Hatten's physical and mental condition during

the years 1936 and 1937, up to the time of his death, was given by his business associates, Hartquist, Freeman, Feathers and Norris. Mr. Hartquist testified that it was difficult to discuss business matters with Mr. Hatten in the office when he would have "those spells, when he was not himself."

"We would say, 'Let's wait until his mind clears and he is in better condition,' and we would try to get him to have a good night's sleep. His condition was not the same at various times during the day. If we could get him to sleep well at night so he would get the better part of his night's sleep then he would be all right in the morning, but towards noon he would start to float off and talk about a lot of peculiar things that we knew there was no use talking business with him any further."

Mr. Hartquist further testified:

"His mind opened and closed is what I have always said. Open when he was normal and we could talk to him. When it closed it was a blank and he would want to talk about men marching through his room or this man in his window. He thought there was a man in his window. We found later that it was his own reflection in the mirror so we hung a piece of paper over the mirror so he could not see that man."

Mr. Hartquist testified that during the times when Mr. Hatten's mind was shut he was not capable of conducting a transaction such as was involved in giving a note of $25,000. On cross-examination, Mr. Hartquist, however, testified that Mr. Hatten was present at the annual meeting of the Hatten Lumber Company on January 1, 1937; that his mind was active and well on that day; that he had times when his mind was quite normal,—during the entire months of January, February, and March, up to the time of his last sickness. On these occasions, the witness was of the opinion that he would be able to understand the nature and effect of a business transaction. He testified that he would say that Mr. Hatten was in good shape on January 30, 1937, when he signed a check for $10,000 as a gift to the city of New London for a park; that at that time he was competent and mentally alert so as to be able to understand the nature and effect of a business transaction. Mr. Hatten was the president of the Hatten Lumber Company up to the time of his death and signed checks for the Hatten Lumber Company, which were countersigned by Mr. Morse, as treasurer.

Mr. Freeman testified that Mr. Hatten executed certain papers and documents in 1936 and 1937 and that he was competent at times so to do; that after he had slept the night before he would be very good; that there were times when he would talk all right and seemed to be all right and then we would take up propositions with him; that at those times we thought his mind would be clear and he would be perfectly normal and that that condition existed up until the time he went to the hospital. Mr. Freeman likewise testified to incidents revealing that Mr. Hatten was at times suffering from delusions and hallucinations but likewise testified that when Mr. Hatten got a good night's rest he was in better condition during the forepart of the day than he was in the afternoon; that he considered Mr. Hatten competent to transact business on January 5, 1937, when he in fact executed a deed; that on November 2, 1936, when Mr. Hatten signed a contract as president of the Hatten Lumber Company he was mentally competent to execute that agreement; that on January 30, 1937, when Mr. Hatten delivered the $10,000 check to the park committee for the use of the city of New London, Mr. Hatten was competent to transact business; that that was a day when Mr. Hatten was bright; and that in his opinion Mr. Hatten at that time would have been competent and able to understand the nature and effect of a business transaction such as the execution of the note in question.

Mr. Norris, an employee of the Hatten Lumber Company, testified that during the last four or five months of Mr. Hatten's life he was at times normal and at other times not normal. There were other witnesses who testified on behalf of the administrator to incidents and actions tending to show that at the times of their occurrences Mr. Hatten was incompetent. On the other hand, there were witnesses, other than the claimant, who saw him quite often during the year or so before his death, and who testified that at those times he was normal and able to talk rationally and coherently and discuss current subjects such as politics and education; that at such times he was competent to enter into a business transaction and able to understand the nature and effect of it. Robert Monsted, the claimant's son, who

lived at home during the winter times, often saw Mr. Hatten at his mother's home and talked to him. He testified that at those times there was nothing in Mr. Hatten's conversation to indicate that he was mentally incompetent. Mr. Jennings, who with a group of other men was instrumental in obtaining the $10,000 donation for the park from Mr. Hatten, testified that Mr. Hatten was competent on January 30, 1937, to transact business and on that day was perfectly competent to do business. Mr. Jost, cashier of the First State Bank of New London, saw Mr. Hatten frequently during 1936 and 1937, and talked with him on many occasions. He testified that the conversations had with Mr. Hatten at those times revealed that he was intelligent and alert and that whenever he talked to Mr. Hatten his conversation appeared to be intelligent. There was considerable other testimony to the same effect. The administrator adduced no testimony relating to Mr. Hatten's mental condition on January 21, 1937, the day when he executed the note in question, except that given in response to hypothetical questions.

Dr. Herbert W. Powers of Milwaukee, an expert on mental diseases and mental disorders, testified in response to a long hypothetical question, that in his opinion Mr. Hatten was incompetent on January 21, 1937, that at that time he did not have the mental capacity to recall services, in recognition of which it is claimed the note was given, or to consider and determine whether there rested on him a legal or moral obligation to make payment therefor, or to weigh and consider the value of such services and then exercise a reasonable judgment in reference to all of such things. Dr. F. J. Pfeifer, produced by the administrator, testified in response to the hypothetical question, that on January 21, 1937, Mr. Hatten was incompetent to do business. However, on cross-examination and in response to a modification of the hypothetical question propounded, he testified that in his opinion Mr. Hatten was competent when he signed the note. The doctor further testified "that a person suffering from senile dementia has lucid intervals, if they are brought on from the outside. Generally they need a little encouraging."

It is clear that all of this testimony bearing upon the mental condition of Mr. Hatten reveals that at times he was incompetent and at other times competent to transact business. A pure question of fact was presented by the evidence; the credibility of the witnesses and the weight of their testimony was for the trial court. Under the established law, we cannot say that the finding of the court that Mr. Hatten was competent on the afternoon of January 21, 1937, when he executed the note, is against the great weight and clear preponderance of the evidence.

The administrator further contends that the court erred in finding that there was a valuable consideration sufficient to support the note and that the note was given for those considerations. The trial court found in substance that for twenty-five years prior to January 21, 1937, the claimant had rendered services, furnished meals and extended the privileges of her home and the use of her automobile to the deceased at his express instance and request; that on two specific occasions during the year 1936, and on numerous other occasions, he promised to pay the claimant for such services, meals, privileges and the use of her automobile; that such services, meals, etc., were not intended by the claimant to be gratuitous and they were furnished and extended with the intention and expectation of being paid therefor; that said services, etc., were of material and pecuniary value to the deceased and that the deceased deemed himself to be legally and morally indebted to the claimant therefor in the sum of $25,000, which he considered to be fair compensation to claimant for the same and that the consideration for said note was the services, meals, privileges of the home and the use of the claimant's automobile.

[7, 8] Were we required to determine whether the services, meals, etc., were reasonably worth the sum of $25,000,—in other words, if this action were one to recover quantum meruit, we should have no hesitation in holding that they were not reasonably worth that amount. That question, however, is not before us. The claimant's claim is founded upon a negotiable promissory note. There must, of course, be consideration to support it, otherwise it is subject to the defense of no consideration as between the parties to it and as against one who is not a holder in due course. Sec. 116.33, Stats. Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration. Sec. 116.29, Stats. Want

of consideration may, of course, be shown but the burden upon him who asserts such want of consideration is the same, or at least as great as that required to establish a mistake. Estate of Flierl, 225 Wis. 493, 274 N.W. 422. To reform a written instrument on the ground of mistake, the proof must be clear and satisfactory. Hoeft v. Kuhnz, 214 Wis. 187, 252 N.W. 589.

"Value is any consideration sufficient to support a simple contract. An antecedent or pre-existing debt constitutes value." Sec. 116.30, Stats.

In 7 Am.Jur. sec. 234, p. 927, under the title "Bills and Notes," it is stated:

"Legal consideration may be of slight value, or it may be a trifling benefit, loss, or act, or it may be of value only to the promising party. It may be of indeterminate value, such as property the value of which is incapable of reduction to any fixed sum and is altogether a matter of opinion, the good will of a business, personal services, or an act which affords the promising party pleasure or gratification, pleases his fancy, or otherwise merits, in his judgment, his appreciation."

It is also said, in that same section:

"The law concerns itself only with the existence of legal consideration for a contract. Mere inadequacy of the consideration is not within this concern. The adequacy in fact, as distinguished from value in law, is for the parties to judge for themselves. There is no rule by which the courts can be guided if once they undertake the determination of such adequacy. However, nothing is consideration that is not regarded as such by both parties."

See also, Estate of Miller, 173 Wis. 322, 181 N.W. 238, 240, where it was said: "Whether or not a consideration is adequate is a matter exclusively for the decision of the parties. 1 Williston on Contracts, par. 140." and also, Rust v. Fitzhugh, 132 Wis. 549, 112 N.W. 508, 511, where it was said: "Generally speaking, a valuable consideration however small is sufficient to support any contract; that inadequacy of consideration alone is not a fatal defect." (Citing cases.)

In Sheldon v. Blackman, 188 Wis. 4, 205 N.W. 486, 489, a claim for $30,000, based upon a written promise to pay at death and an acknowledgment of indebtedness for services rendered, was upheld. The estate defended on the ground that the consideration was inadequate. It was there said:

"In this case the services had been rendered under such conditions and were of so intimate and delicate a character that their value could be estimated with no degree of mathematical certainty. No one knew their value so well as Mr. and Mrs. Wilkinson, and if he had not appreciated their value he would have been guilty of gross ingratitude. Evidently he did realize their worth, and desired to make liberal compensation, which he had the perfect right to do. If he deliberately chose to pay more than the sevices were really worth, he had the right to do so. To receive the consideration and respect of others, and to be able to be generous in later life, are among the motives which prompt men to practice economy and self-denial. There had been a consideration of inestimable value for the execution of the note, and it was in no sense a gift. The utmost that can be fairly claimed is that the consideration for the note was inadequate. But under such facts as here exist mere inadequacy does not amount to a failure or partial failure of consideration. * * * There is abundant authority for the rule that, when the value of services is indefinite or indeterminate, or largely a matter of opinion, the courts will not substitute their judgments for that of the contracting parties."

Substantially similar language was used in Estate of McAskill, 216 Wis. 276, 257 N. W. 177, 179; in upholding two claims against that estate based on promissory notes given in acknowledgment of services and care, deemed by the promisor not to have been paid for by the regular monthly compensation theretofore paid, the court said:

"Under such circumstances, even though the value of the services may be deemed by others to be less than the promised amount, that does not necessarily warrant holding that there is a failure, or partial failure, of consideration. When the value of services performed under such circumstances is indefinite, or indeterminate, or largely a matter of opinion, the courts will not substitute their judgment for that of the contracting parties. No one knew the value of the services as well as McAskill."

In Citizens' National Bank of Pocomoke City v. Custis, 155 Md. 173, 141 A. 556, 557, a claim for $10,000 based upon a promissory note executed by the deceased, was

upheld. The evidence showed that the claimant lived near to the home of the deceased and had rendered, during a considerable period of time, personal services to the deceased, in recognition of which the note in suit was given. The court said:

"A sufficient reference has been made to the testimony for the plaintiff to indicate its nature and effect. It tended to prove that the plaintiff rendered valuable and long-continued services to the defendant's testator, for which he felt obligated to pay, and for which the note in question was intended as compensation. The decedent was in a position to estimate the value to him of the ministrations which he thus accepted from one with whom he had no family relationship. His resources were ample for the payment of the note by which his appreciation of the service was given practical expression. It would not be proper to hold that the note was without consideration because the reward it provided might be regarded as unnecessarily generous."

[9, 10] Under the law, which requires clear and satisfactory proof of want of consideration, the trial court may well have concluded that the administrator failed to meet that burden. It must be held that the finding of the trial court, that the note was supported by a valuable consideration, cannot be said to be against the great weight and clear preponderance of the evidence. The finding of the trial court was obviously largely based upon the testimony of the claimant. Her credibility and the weight of her testimony were for the trial court's determination.

[11] Moreover, in this state we have adopted what is said to be the liberal rule as to moral consideration and have held that a receipt by the promisor of an actual benefit will support an executory promise and that a moral consideration may be sufficient to support an executory promise "where the promisor originally received from the promisee something of value sufficient to arouse a moral, as distinguished from a legal, obligation." Park Falls State Bank v. Fordyce, 206 Wis. 628, 635, 238 N.W. 516, 518, 79 A.L.R. 1339. In Elbinger v. Capitol & Teutonia Co., 208 Wis. 163, 242 N.W. 568, 569, in commenting upon the holding in Park Falls State Bank v. Fordyce, supra, it was said:

"We there held that whenever the promisor has originally received value, material pecuniary benefit, under circumstances giving rise to a moral obligation on his part to pay for that which he has received, it is a sufficient consideration to support a promise on his part to pay therefor." See also, Estate of Smith, 226 Wis. 556, 277 N. W. 141.

In Onsrud v. Paulsen, 219 Wis. 1, 261 N.W. 541, 542, it was said: "A consideration may consist of a benefit to the promisor or a detriment to the promisee." and the law stated in Park Falls State Bank v. Fordyce, supra, was again followed.

[12] The defendant further contends that the proven facts raised a presumption of undue influence which the claimant has not met.

In view of the fact that the evidence relating to the execution of the note has been fully recited and much of the evidence relative to the mental condition of the deceased has been recited, we see no useful purpose in reciting the evidence in connection with the issue of undue influence.

The trial court found that on January 21, 1937, the deceased was not susceptible to undue or improper influence; that the making, execution and delivery of the note did not indicate or evidence that undue influence on the part of the claimant had been exercised; that the claimant on that day or at any time prior thereto had exercised or had a disposition to exercise any undue or improper influence over the deceased in the making of the note; and that the note was the free act and deed of the deceased. We are of the opinion that those findings are not against the great weight and clear preponderance of the evidence and therefore may not be disturbed.

[13] The administrator further contends that the court erred in holding that the claimant was entitled to recover, in addition to the principal of the note and interest, the sum of $1,325 as attorneys fees under the provision of the note that the maker agrees "to pay all attorney fees and costs if placed in the hands of an attorney for collection or suit." This contention is grounded upon the fact that the note itself was not filed with the court within the non-claim period and that the claim filed within that period did not make the note a part of the claim or specifically incorporate into the claim the terms concerning the payment of attorney's fees contained therein. The claimant, in both

the original claim filed and in her complaint, pleaded a claim based upon a promissory note. That was sufficient to permit a recovery according to the terms of the note, and the attorney's fees were within the scope of the claim. Had the claim been allowed and paid without a contest, the claimant would not have been entitled to attorney's fees. Merely filing a claim against an estate would hardly be considered as an act of placing the note in the hands of an attorney for collection or for suit. Compare, Estate of McAskill, supra.

In our opinion the trial court was justified in allowing the plaintiff reasonable attorney's fees.

[14] We may say in conclusion that every finding of the county court which the administrator contends was not supported by the evidence is upheld on the ground that it is not against the great weight and clear preponderance of the evidence. Had the county court found as the administrator contends it should have found upon the evidence, such findings doubtless would have had to be upheld for the same reasons. The issues of fact were peculiarly for the determination of the county court. The trial court reserved its decision for several months after having had the benefit of full arguments made in the written briefs. Its decision reveals careful study and analysis of the issues and a knowledge of the applicable law.

Judgment affirmed.

FOWLER, Justice (dissenting).

To the rulings of the court that the findings of the trial court that Mr. Hatten signed the note in suit, that he was mentally competent at the time he signed it, and that there is no evidence that his signature was procured by undue influence exercised by the defendant, must be sustained, I agree. These findings can not be said to be against the great weight and clear preponderance of the evidence and therefore must be sustained on appeal. But I can not go any further with the court than this.

The three findings of the trial court above referred to being sustained it follows that Mr. Hatten could by will have bequeathed to the defendant $25,000 if he wanted to. The note in suit is not a will for want of execution with the formalities required for a will. Also he might have made a gift of $25,000 to the defendant if he wanted to, but a promissory note is not a gift, but only an unexecuted promise to make a gift. Tyler v. Stitt, 127 Wis. 379, 106 N.W. 114; In re Smith's Estate, 226 Wis. 556, 277 N.W. 141.

It is true that a promissory note payable after the death of the maker may be enforced if it is supported by a valuable consideration. A good consideration is not sufficient. Smith case, supra. But "an alleged indebtedness or liability that does not in fact exist or which is not a binding and legally enforcible obligation of the obligor can not ordinarily constitute a consideration for a bill or note." 10 C.J.S., Bills and Notes, page 605, § 150; 8 Corpus Juris 216, notes 48, 50. There are of course exceptions, as notes against which the statute of limitations has run and notes which have been discharged in bankruptcy. But under the rule above stated the consideration of the note in suit, if there is any, must rest on the facts that a contract existed between Mr. Hatten and the defendant that he would pay her for the things furnished him and that he executed and delivered to her this note as compensation for those things. I can not read from the evidence in this case any such agreement. Such agreement if it existed must be made out from the testimony of the defendant herself. It is true that the instrument in suit is a negotiable promissory note reciting that it was given for value received, and that there is a presumption in the first instance that it was given for a valuable consideration. But when the testimony shows precisely what the consideration was, the presumption is of no avail to support the note.

The testimony of the defendant so far as it bears on the consideration for the note is as follows:

"The consideration of the note was for the privileges that he had had in my home over a period of a number of years, for the services that had been rendered to him through my family and myself over a period of years, for privileges that I had made for him and for other things I did for him that he considered of value to him to the amount of what he paid for my obligations * * * I knew Mr. Hatten for twenty-five years. At times he came to my home for meals during that entire time but not so frequently as in the last seven years. Sometimes he would be there for a couple of meals a week during the last seven years and sometimes I would not

see him for a month, and then when my husband was sick he was there probably a couple of times a week and then later three times a week and in the last year he averaged about three or four times a week. He usually stayed and visited a while after meal time. Sometimes he would stay for the evening. Sometimes he would come up before church Sunday morning and bring his collar along in his pocket, and would go in and get himself ready to go to church, and he would come there for lunch and spend the afternoon and along towards evening he would go home. Sometimes my son would take the car and take him home.

"On one occasion Mr. Hatten came up there and laid down on the studio couch. He claimed his hotel room was very cold and he would be almost frozen. I would start the fire in the fireplace and he would go on the couch and fall asleep. This night I came down in the morning and he was still there. Several times in the evening he would fall asleep and I would let him lie there and would call my son and he would come over. Once it bothered me because he was sleeping so soundly. I called up my son and had him look him over and he said, 'he is having the sleep of his life, let him sleep and I will come over later.' Mr. Hatten was very sensitive. I would have my son drop in, not letting him know he was coming there to take him home. On that occasion he slept on the studio couch in the library. * * *

"I was asked, 'You weren't doing it with the expectation of getting money?' And I answered, 'No sir, I wasn't doing it expecting to receive money at that time, although I felt as though what we did for him I should be paid. I did not feel as though I could afford to take him out in my car as much as I did.'

"I was asked whether it registered very sharply with me, and I answered, 'I felt as though if he wanted to pay me all right, if he didn't all right. That is the way I felt about it.' That is my feeling at present. * * *

"I mean I rendered these same kind of services for twenty-five years. He never said anything about the period of time during which I had been kind to him. He did say he appreciated the privileges of my home and what my family and I had done for him. The services I rendered as the hostess in the home were the usual acts of hospitality I or anyone else would render to a guest in the home. * * * I never presented this note to Mr. Hatten for payment."

From this testimony I am unable to see how any one can spell out any legal obligation on Mr. Hatten's part to pay the defendant for what the defendant did for him. It seems to me plain that had the note not been given, the defendant would not have made any claim against Mr. Hatten or against his estate, and that if she had it would not have been enforcible as a legal obligation. Confessedly there was no legal obligation to pay for anything but the meals and use of automobile furnished. All else was a mere courtesy extended by one friend to another. While the defendant undertakes to include twenty-five years in the period during which these things were furnished, whatever of them was furnished prior to the death of the defendant's husband, was not due and recoverable by the defendant, if due and recoverable at all, but by the defendant's husband, who lived until November, 1932. Thus the defendant could recover if at all for only meals and automobile service furnished for the seven years after her husband's death. The value of the meals furnished could hardly have exceeded $200 during this period. The value of automobile service recoverable could hardly have been as much as that.

From the testimony quoted I can not spell out a legal obligation of Hatten, nor can I see how the trial judge could.

Were we to discard all of the defendant's testimony but that to the effect that she expected to be paid for what she did for Hatten and her testimony that Hatten said—on two occasions—that she would be paid for what she did—I can see nothing more than an agreement to pay her the value of the service rendered, which as above stated would not exceed $400 or $500. For this $25,000 is demanded. To my single-track mind the most recoverable would be the value of the things furnished. The rest included in the note was a mere attempt to make a gift, a mere unfulfilled promise to make a gift. To make the things furnished constitute a consideration for the amount of the note there must be some reasonable relation between the value of the things furnished and the amount of the note. The amount of the note must constitute by force of some process of reasoning no more than permissible reasonable

compensation for the things furnished. Else the way is opened for the plundering of estates through the subterfuge of getting mere promises to make gifts and invalid attempts at testamentary dispositions declared enforcible contracts. Suppose instead of writing in the note "Twenty-five thousand dollars," Hatten had written in "Twenty-five hundred thousand dollars." Would any court have held the note valid as supported by a consideration? Upon the reasoning here relied on a note for $2,500,000 would be valid if the instant note is.

Two decisions of this court are relied on in particular as supporting the instant recovery. Sheldon v. Blackman, 188 Wis. 4, 205 N.W. 486, and Estate of McAskill, 216 Wis. 276, 257 N.W. 177. The facts in these cases taken as a whole are as far from the facts of the instant case as noon is from midnight, as a reading of the opinions in these cases will show. Besides it is said in the Sheldon case [188 Wis. 4, 205 N.W. 489],—

"There might be circumstances under which the inadequacy of consideration might be so grossly disproportionate to the value of the benefit received or the services rendered that a court might feel justified in refusing to enforce the contract."

The circumstances of this case, if ever there might be such circumstances, not only justify but in my opinion compel this court to refuse "to enforce the contract" if there was a contract.

The defendant drags in, and the opinion of the court seems to sanction it, the case of Park Falls State Bank v. Fordyce, 206 Wis. 628, 238 N.W. 516, 79 A.L.R. 1339, as holding that a mere moral consideration will support a promissory note. The case in my view goes to no such extent. The holding of that case is correctly stated in Elbinger v. Capitol & Teutonia Co., 208 Wis. 163, 165, 242 N.W. 568, 569, as follows:

"We there held that whenever the promisor has originally received value, material pecuniary benefit, under circumstances giving rise to a moral obligation on his part to pay for that which he has received, it is a sufficient consideration to support a promise on his part to pay therefor."

To the same effect is Estate of Smith, supra.

In my opinion the judgment of the county court should be reversed and the claim disallowed; or at most allowed only to the extent of the value of the meals and use of the automobile furnished by defendant after the death of her husband.

In re JOHNSON'S WILL.

KRUEGER v. JOHNSON.

Supreme Court of Wisconsin.

Nov. 7, 1939.

1. Appeal and error ⇐1012(1)

In considering trial court's fact findings on appeal, Supreme Court's principal concern is to determine whether such findings are against great weight and clear preponderance of evidence.

2. Executors and administrators ⇐256(6)

Evidence *held* sufficient to support trial court's findings that instrument providing that signer's estate must pay named woman stated sum within three months after signer's death was delivered to her by signer in payment and satisfaction of all her claims against him for services paid for only in part and hence was contractual, not testamentary, and supported by consideration.

3. Contracts ⇐249

An instrument, providing that signer's estate must pay named woman certain sum within three months after signer's death, *held* not intended as gift to take effect after his death, but contractual in character as delivered to such woman in satisfaction of signer's indebtedness to her for services rendered, and hence not canceled by provisions in instruments subsequently executed by signer.

4. Appeal and error ⇐203(3)

Error may not be assigned on ground that testimony, admitted by trial court without objection, was incompetent as concerning witness' transactions with person since deceased.

FOWLER, J., dissenting.

Appeal from a judgment of the County Court of Monroe County; Harry N. Perry, County Judge, presiding.

[1947] K.B. 130
Central London Property Trust Limited v. High
KING's BENCH DIVISION
1946 July 18.

Central London Property Trust Limited v. High Trees House Limited.

KING's BENCH DIVISION

Denning J.

1946 July 18.

Contract--Agreement intended to create legal relations--Promise made thereunder--Knowledge of promisor that promisee will act on promise--Promise acted on--Enforceability of agreement without strict consideration--Agreement under seal--Variation of by agreement of lesser value--Estoppel.

By a lease under seal dated September 24, 1937, the plaintiff company let to the defendant company (a subsidiary of the plaintiffs) a block of flats for a term of ninety-nine years from September 29, 1937, at a ground rent of 2,500l. a year. In the early part of 1940, owing to war conditions then prevailing, only a few of the flats in the block were let to tenants and it became apparent that the defendants would be unable to pay the rent reserved by the lease out of the rents of the flats. Discussions took place between the directors of the two companies, which were closely connected, and, as a result, on January 3, 1940, a letter was written by the plaintiffs to the defendants confirming that the ground rent of the premises would be reduced from 2,500l. to 1,250l. as from the beginning of the term. The defendants thereafter paid the reduced rent. By the beginning of 1945 all the flats were let but the defendants continued to pay only the reduced rent. In September, 1945, the plaintiffs wrote to the defendants claiming that rent was payable at the rate of 2,500l. a year and, subsequently, in order to determine the legal position, they initiated friendly proceedings in which they claimed the difference between rent at the rates of 2,500l. and 1,250l. for the quarters ending September 29 and December 25, 1945. By their defence the defendants pleaded that the agreement for the reduction of the ground rent operated during the whole term of the lease and, as alternatives, that the plaintiffs were estopped from demanding rent at the higher rate or had waived their right to do so down to the date of their letter of September 21, 1945.

Held:

(1.) that where parties enter into an arrangement which is intended to create legal relations between them and in pursuance of such arrangement one party makes a promise to the other which he knows will be acted on and which is in fact acted on by the promisee, the court will treat the promise as binding on the promisor to the extent that it will not allow him to act inconsistently with it even although the promise may not be supported by consideration in the

strict sense and the effect of the arrangement made is to vary the terms of a contract under seal by one of less value; and
(2.) that the arrangement made between the plaintiffs and the defendants in January, 1940, was one which fell within the above category and, accordingly, that the agreement for the reduction of the ground rent was binding on the plaintiff company, but that it only remained operative so long as the conditions giving rise to it continued to exist and that on their ceasing to do so in 1945 the *131 plaintiffs were entitled to recover the ground rent claimed at the rate reserved by the lease.

ACTION tried by Denning J.

By a lease under seal made on September 24, 1937, the plaintiffs, Central London Property Trust Ld., granted to the defendants, High Trees House Ld., a subsidiary of the plaintiff company, a tenancy of a block of flats for the term of ninety-nine years from September 29, 1937, at a ground rent of 2,500l. a year. The block of flats was a new one and had not been fully occupied at the beginning of the war owing to the absence of people from London. With war conditions prevailing, it was apparent to those responsible that the rent reserved under the lease could not be paid out of the profits of the flats and, accordingly, discussions took place between the directors of the two companies concerned, which were closely associated, and an arrangement was made between them which was put into writing. On January 3, 1940, the plaintiffs wrote to the defendants in these terms, "we confirm the arrangement made between us by which the ground rent should be reduced as from the commencement of the lease to 1,250l. per annum," and on April 2, 1940, a confirmatory resolution to the same effect was passed by the plaintiff company. On March 20, 1941, a receiver was appointed by the debenture holders of the plaintiffs and on his death on February 28, 1944, his place was taken by his partner. The defendants paid the reduced rent from 1941 down to the beginning of 1945 by which time all the flats in the block were fully let, and continued to pay it thereafter. In September, 1945, the then receiver of the plaintiff company looked into the matter of the lease and ascertained that the rent actually reserved by it was 2,500l. On September 21, 1945, he wrote to the defendants saying that rent must be paid at the full rate and claiming that arrears amounting to 7,916l. were due. Subsequently, he instituted the present friendly proceedings to test the legal position in regard to the rate at which rent was payable. In the action the plaintiffs sought to recover 625l., being the amount represented by the difference between rent at the rate of 2,500l. and 1,250l. per annum for the quarters ending September 29, and December 25, 1945. By their defence the defendants pleaded (1.) that the letter of January 3, 1940, constituted an agreement that the rent reserved should be 1,250l. only, and that such agreement related to the whole term of the lease, *132 (2.) they pleaded in the alternative that the plaintiff company were estopped from alleging that the rent exceeded 1,250l. per annum and (3.) as a further alternative, that by failing to demand rent in excess of 1,250l. before their letter of September 21, 1945 (received by the defendants on September 24), they had waived their rights in respect of any rent, in excess of that at the rate of 1,250l., which had accrued up to September 24, 1945.

Fortune for the plaintiffs. The plaintiffs are entitled to recover rent on the basis of it

being at the rate of 2,500l. a year, the amount reserved by the lease. The document in question was under seal and consequently could not be varied by a parol agreement or an agreement in writing not under seal. If there was a fresh agreement, it was void since it was made without consideration and in any event it was only an agreement of a purely temporary character necessitated by the difficult conditions prevailing when it was made, and coming to an end when those conditions ceased to exist at the end of 1944 or the beginning of 1945. Even supposing that the plaintiffs were held to be estopped from denying the existence of a new agreement, such estoppel would only operate so long as the conditions giving rise to the arrangement on which the estoppel was based, continued. [Denning J. This subject was considered by Simonds J. in Re William Porter & Co., Ld. [FN1].] It has recently been considered by Humphreys J. in Buttery v. Pickard [FN2]. He also referred to Forquet v. Moore [FN3], Crowley and Others v. Vitty [FN4] and Foa, Landlord and Tenant, 6th ed., p. 701.

FN1 [1937] 2 All E. R. 361.

FN2 [1946] W. N. 25.

FN3 (1852) 22 L. J. (Ex.) 35.

FN4 (1852) 21 L. J. (Ex.) 135.

Ronald Hopkins for the defendants. The company are only liable to pay rent at the rate of 1,250l. per annum. The letters passing between the parties and the entry in the minute book of the plaintiff company constitute evidence of an agreement, which, although possibly not supported by such consideration as would strictly be necessary at common law, was of a type which a court of equity would enforce if it were satisfied that the parties intended to give contractual efficacy to that to which they were agreeing. The reduction in rent was made so that the defendants might be enabled to continue to run their business and that was sufficient to enable a court to hold the agreement binding on the plaintiff company. With regard *133 to the variation of an agreement under seal by a parol agreement or an agreement in writing, in Berry v. Berry [FN5], Swift J. said it was true that a covenant could not be varied except by some contract of equal value, but, he continued "although that was the rule of law, the courts of equity have always held themselves at liberty, to allow the rescission or variation by a simple contract of a contract under seal by preventing the party who has agreed to the rescission or variation from suing under the deed. In Nash v. Armstrong [FN6] it was held that a parol agreement not to enforce performance of a deed and to substitute other terms for some of its covenants was a good consideration for a promise to perform the substituted contract ..." If the above contentions fail, the defendants rely on the doctrine of estoppel, The propositions of law laid down in Re William Porter & Co., Ld. [FN7] exactly apply to the present case. The reduction in the rent was made in order that the defendants might be able to carry on their business. As a result of the reduction the business was carried on and the defendants arranged their affairs on the basis of the reduced rent with the result that the plaintiffs are estopped from claiming any rent beyond 1,260l. per annum for the whole period

of the lease. Finally, the letters passing between the parties constituted a waiver by the plaintiffs of their right to a higher rent than 1,250l. down to the date of their letter of September 21, 1945.

FN5 [1929] 2 K. B. 316, 319.

FN6 (1861) 10 C. B. (N. S.) 259.

FN7 [1937] 2 All E. R. 361.

Fortune in reply.

DENNING J.
stated the facts and continued: If I were to consider this matter without regard to recent developments in the law, there is no doubt that had the plaintiffs claimed it, they would have been entitled to recover ground rent at the rate of 2,500l. a year from the beginning of the term, since the lease under which it was payable was a lease under seal which, according to the old common law, could not be varied by an agreement by parol (whether in writing or not), but only by deed. Equity, however stepped in, and said that if there has been a variation of a deed by a simple contract (which in the case of a lease required to be in writing would have to be evidenced by writing), the courts may give effect to it as is shown in Berry v. Berry [FN8]. That equitable doctrine, however, could hardly apply in the present case because the variation here *134 might be said to have been made without consideration. With regard to estoppel, the representation made in relation to reducing the rent, was not a representation of an existing fact. It was a representation, in effect, as to the future, namely, that payment of the rent would not be enforced at the full rate but only at the reduced rate. Such a representation would not give rise to an estoppel, because, as was said in Jorden v. Money [FN9], a representation as to the future must be embodied as a contract or be nothing.

FN8 [1929] 2 K. B. 316.

FN9 (1854) 5 H. L. C. 185.

But what is the position in view of developments in the law in recent years? The law has not been standing still since Jorden v. Money [FN10]. There has been a series of decisions over the last fifty years which, although they are said to be cases of estoppel are not really such. They are cases in which a promise was made which was intended to create legal relations and which, to the knowledge of the person making the promise, was going to be acted on by the person to whom it was made and which was in fact so acted on. In such cases the courts have said that the promise must be honoured. The cases to which I particularly desire to refer are: Fenner v. Blake [FN11], In re Wickham [FN12], Re William Porter & Co., Ld. [FN13] and Buttery v. Pickard [FN14]. As I have said they are not cases of estoppel in the strict sense. They are really promises - promises intended to be binding, intended to be acted on, and in fact acted on. Jorden v. Money [FN15] can be distinguished,

because there the promisor made it clear that she did not intend to be legally bound, whereas in the cases to which I refer the proper inference was that the promisor did intend to be bound. In each case the court held the promise to be binding on the party making it, even though under the old common law it might be difficult to find any consideration for it. The courts have not gone so far as to give a cause of action in damages for the breach of such a promise, but they have refused to allow the party making it to act inconsistently with it. It is in that sense, and that sense only, that such a promise gives rise to an estoppel. The decisions are a natural result of the fusion of law and equity: for the cases of Hughes v. Metropolitan Ry. Co. [FN16], Birmingham and District Land Co. v. London & North Western Ry. Co. [FN17] and Salisbury (Marquess) v. Gilmore [FN18], afford a *135 sufficient basis for saying that a party would not be allowed in equity to go back on such a promise. In my opinion, the time has now come for the validity of such a promise to be recognized. The logical consequence, no doubt is that a promise to accept a smaller sum in discharge of a larger sum, if acted upon, is binding notwithstanding the absence of consideration: and if the fusion of law and equity leads to this result, so much the better. That aspect was not considered in Foakes v. Beer [FN19]. At this time of day however, when law and equity have been joined together for over seventy years, principles must be reconsidered in the light of their combined effect. It is to be noticed that in the Sixth Interim Report of the Law Revision Committee, pars. 35, 40, it is recommended that such a promise as that to which I have referred, should be enforceable in law even though no consideration for it has been given by the promisee. It seems to me that, to the extent I have mentioned that result has now been achieved by the decisions of the courts.

FN10 (1854) 5 H. L. C. 185.

FN11 [1900] 1 Q. B. 426.

FN12 (1917) 34 T. L. R. 158.

FN13 [1937] 2 All E. R. 361.

FN14 [1946] W. N. 25.

FN15 (1854) 5 H. L. C. 185.

FN16 (1877) 2 App. Cas. 439, 448.

FN17 (1888) 40 Ch. D. 268, 286.

FN18 [1942] 2 K. B. 38, 51.

FN19 (1884) 9 App. Cas. 605.

I am satisfied that a promise such as that to which I have referred is binding and the

only question remaining for my consideration is the scope of the promise in the present case. I am satisfied on all the evidence that the promise here was that the ground rent should be reduced to 1,250l. a year as a temporary expedient while the block of flats was not fully, or substantially fully let, owing to the conditions prevailing. That means that the reduction in the rent applied throughout the years down to the end of 1944, but early in 1945 it is plain that the flats were fully let, and, indeed the rents received from them (many of them not being affected by the Rent Restrictions Acts), were increased beyond the figure at which it was originally contemplated that they would be let. At all events the rent from them must have been very considerable. I find that the conditions prevailing at the time when the reduction in rent was made, had completely passed away by the early months of 1945. I am satisfied that the promise was understood by all parties only to apply under the conditions prevailing at the time when it was made, namely, when the flats were only partially let, and that it did not extend any further than that. When the flats became fully let, early in 1945, the reduction ceased to apply.

In those circumstances, under the law as I hold it, it seems to me that rent is payable at the full rate for the quarters ending September 29 and December 25, 1945.

*136 If the case had been one of estoppel, it might be said that in any event the estoppel would cease when the conditions to which the representation applied came to an end, or it also might be said that it would only come to an end on notice. In either case it is only a way of ascertaining what is the scope of the representation. I prefer to apply the principle that a promise intended to be binding, intended to be acted on and in fact acted on, is binding so far as its terms properly apply. Here it was binding as covering the period down to the early part of 1945, and as from that time full rent is payable.

I therefore give judgment for the plaintiff company for the amount claimed.

Judgment for plaintiffs. (P. B. D.)

Ricketts v. Scothorn

77 N.W. 365
RICKETTS
v.
SCOTHORN.
Supreme Court of Nebraska.
Dec. 8, 1898.

Syllabus by the Court.

1. A nonnegotiable note given to the payee thereof as a gratuity, being nothing more than a promise by the payor to make a gift in the future of the sum of money therein mentioned, is without consideration, and cannot, except under special circumstances, be enforced by action.

2. A promissory note given by the maker to the payee to enable the latter to cease work, but without any condition being imposed, or promise exacted, is without consideration, and may be repudiated, in the absence of circumstances creating an equitable estoppel.

3. But where the payee of such an obligation has been induced to abandon a lucrative occupation in reliance on the note being paid, and has taken such action in accordance with the expectation of the maker, neither the latter nor his legal representatives will be permitted to resist payment on the ground that there was no consideration for the promise.

4. The note in suit was executed to the plaintiff by a relative to enable her to live without working, whereupon she abandoned the occupation in which she was engaged, and remained idle for more than a year. This action on her part was contemplated by the relative as the probable consequence of the execution of the note. Held, that want of consideration could not be alleged as defense.

Error to district court, Lancaster county; Holmes, Judge.

Action by Katie Scothorn against Andrew D. Ricketts, executor of the will of J. C. Ricketts, deceased. There was a judgment for plaintiff, and defendant brings error. Affirmed.

SULLIVAN, J.

In the district court of Lancaster county the plaintiff, Katie Scothorn, recovered judgment against the defendant, Andrew D. Ricketts, as executor of the last will and testament of John C. Ricketts, deceased. The action was based upon a *366 promissory note, of which the following is a copy: "May the first, 1891. I promise to pay to Katie Scothorn on demand, $2,000, to be at 6 per cent. per annum. J. C. Ricketts." In the petition the plaintiff alleges that the consideration for the execution of the note was that she should surrender her employment as bookkeeper for Mayer Bros., and cease to work for a living. She also alleges that the note was given to induce her to abandon her occupation, and that, relying on it, and on the annual interest, as a means of support, she gave up the employment in which she was then engaged. These allegations of the petition are denied by the administrator. The material facts are undisputed. They are as follows: John C. Ricketts, the maker of the note, was the

grandfather of the plaintiff. Early in May--presumably on the day the note bears date--he called on her at the store where she was working. What transpired between them is thus described by Mr. Flodene, one of the plaintiff's witnesses: "A. Well, the old gentleman came in there one morning about nine o'clock, probably a little before or a little after, but early in the morning, and he unbuttoned his vest, and took out a piece of paper in the shape of a note; that is the way it looked to me; and he says to Miss Scothorn, 'I have fixed out something that you have not got to work any more.' He says, none of my grandchildren work, and you don't have to. Q. Where was she? A. She took the piece of paper and kissed him, and kissed the old gentleman, and commenced to cry." It seems Miss Scothorn immediately notified her employer of her intention to quit work, and that she did soon after abandon her occupation. The mother of the plaintiff was a witness, and testified that she had a conversation with her father, Mr. Ricketts, shortly after the note was executed, in which he informed her that he had given the note to the plaintiff to enable her to quit work; that none of his grandchildren worked, and he did not think she ought to. For something more than a year the plaintiff was without an occupation, but in September, 1892, with the consent of her grandfather, and by his assistance, she secured a position as bookkeeper with Messrs. Funke & Ogden. On June 8, 1894, Mr. Ricketts died. He had paid one year's interest on the note, and a short time before his death expressed regret that he had not been able to pay the balance. In the summer or fall of 1892 he stated to his daughter, Mrs. Scothorn, that if he could sell his farm in Ohio he would pay the note out of the proceeds. He at no time repudiated the obligation. We quite agree with counsel for the defendant that upon this evidence there was nothing to submit to the jury, and that a verdict should have been directed peremptorily for one of the parties. The testimony of Flodene and Mrs. Scothorn, taken together, conclusively establishes the fact that the note was not given in consideration of the plaintiff pursuing, or agreeing to pursue, any particular line of conduct. There was no promise on the part of the plaintiff to do, or refrain from doing, anything. Her right to the money promised in the note was not made to depend upon an abandonment of her employment with Mayer Bros., and future abstention from like service. Mr. Ricketts made no condition, requirement, or request. He exacted no quid pro quo. He gave the note as a gratuity, and looked for nothing in return. So far as the evidence discloses, it was his purpose to place the plaintiff in a position of independence, where she could work or remain idle, as she might choose. The abandonment of Miss Scothorn of her position as bookkeeper was altogether voluntary. It was not an act done in fulfillment of any contract obligation assumed when she accepted the note. The instrument in suit, being given without any valuable consideration, was nothing more than a promise to make a gift in the future of the sum of money therein named. Ordinarily, such promises are not enforceable, even when put in the form of a promissory note. Kirkpatrick v. Taylor, 43 Ill. 207; Phelps v. Phelps, 28 Barb. 121; Johnston v. Griest, 85 Ind. 503; Fink v. Cox, 18 Johns. 145. But it has often been held that an action on a note given to a church, college, or other like institution, upon the faith of which money has been expended or obligations incurred, could not be successfully defended on the ground of a want of consideration. Barnes v. Perine, 12 N. Y. 18; Philomath College v. Hartless, 6 Or. 158; Thompson v. Board, 40 Ill. 379; Irwin v. Lombard University, 56 Ohio St. 9, 46 N. E. 63. In this class of cases the note in suit is nearly always spoken of as a gift or donation, but the decision is generally put on the ground that the expenditure of money or assumption of liability by the donee on the faith of the promise

constitutes a valuable and sufficient consideration. It seems to us that the true reason is the preclusion of the defendant, under the doctrine of estoppel, to deny the consideration. Such seems to be the view of the matter taken by the supreme court of Iowa in the case of Simpson Centenary College v. Tuttle, 71 Iowa, 596, 33 N. W. 74, where Rothrock, J., speaking for the court, said: "Where a note, however, is based on a promise to give for the support of the objects referred to, it may still be open to this defense [want of consideration], unless it shall appear that the donee has, prior to any revocation, entered into engagements, or made expenditures based on such promise, so that he must suffer loss or injury if the note is not paid. This is based on the equitable principle that, after allowing the donee to incur obligations on the faith that the note would be paid, the donor would be estopped from pleading want of consideration." And in the case of Reimensnyder v. Gans, 110 Pa. St. 17, 2 Atl. 425, which was an action on a note given as a donation to a *367 charitable object, the court said: "The fact is that, as we may see from the case of Ryerss v. Trustees, 33 Pa. St. 114, a contract of the kind here involved is enforceable rather by way of estoppel than on the ground of consideration in the original undertaking." It has been held that a note given in expectation of the payee performing certain services, but without any contract binding him to serve, will not support an action. Hulse v. Hulse, 84 E. C. L. 709. But when the payee changes his position to his disadvantage in reliance on the promise, a right of action does arise. McClure v. Wilson, 43 Ill. 356; Trustees v. Garvey, 53 Ill. 401.

Under the circumstances of this case, is there an equitable estoppel which ought to preclude the defendant from alleging that the note in controversy is lacking in one of the essential elements of a valid contract? We think there is. An estoppel in pais is defined to be "a right arising from acts, admissions, or conduct which have induced a change of position in accordance with the real or apparent intention of the party against whom they are alleged." Mr. Pomeroy has formulated the following definition: "Equitable estoppel is the effect of the voluntary conduct of a party whereby he is absolutely precluded, both at law and in equity, from asserting rights which might, perhaps, have otherwise existed, either of property, of contract, or of remedy, as against another person who in good faith relied upon such conduct, and has been led thereby to change his position for the worse, and who on his part acquires some corresponding right, either of property, of contract, or of remedy." 2 Pom. Eq. Jur. 804. According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week, Her grandfather, desiring to put her in a position of independence, gave her the note, accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect, he suggested that she might abandon her employment, and rely in the future upon the bounty which he promised. He doubtless desired that she should give up her occupation, but, whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration. The petition charges the elements of an equitable estoppel, and the evidence conclusively establishes them. If errors intervened at the trial, they could not have been prejudicial. A verdict for the defendant would be unwarranted. The judgment is right, and is affirmed.

Seavey v. Drake

62 N.H. 393

SEAVEY

v.

DRAKE & a., Ex'rs.

Supreme Court of New Hampshire.

December, 1882.

*1 Equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and if the donee, induced by the promise to give it, has made valuable improvements on the property.

BILL IN EQUITY, for specific performance of a parol agreement of land. At the hearing the plaintiff offered to prove that he was the only child of Shadrach Seavey, the defendants' testate, who died in 1880. In January, 1860, the testator, owning a tract of land, and wishing to assist the plaintiff, went upon the land with him and gave him a portion of it, which the plaintiff then accepted and took possession of. The plaintiff had a note against his father upon which there was due about $200, which he then or subsequently gave up to him. Subsequently his father gave him an additional strip of land adjoining the other tract. Ever since the gifts, the plaintiff has occupied and still occupies the land, and has paid all taxes upon it. He has expended $3,000 in the erection of a dwelling-house, barn, and stable, and in other improvements upon the premises. Some of the lumber for the house was given him by his father, who helped him do some of the labor upon the house.

The defendants moved to dismiss the bill because no cause for equitable relief was stated, and because the parol contract, which is sought to be enforced, was without consideration, and is executory. The bill alleges a gift of the land to the plaintiff and a promise to give him a deed of it. The defendants also demurred, and answered denying the material allegations of the bill.

If the bill can be sustained on proof of these facts, or if not on these facts, but would be with the additional proof of a consideration for the promise, there is to be a further hearing, the plaintiff having leave to amend his bill. If on proof of these facts, either with or without proof of consideration, the bill cannot be sustained, it is to be dismissed.

SMITH, J.

The bill alleges a promise by the defendants' testator to give the plaintiff a deed. The plaintiff offered to prove that the deceased gave him the land, and that he thereupon entered into possession and made valuable improvements. We assume that the plaintiff in his offer meant that he was induced by the gift of the land to enter into possession and make large expenditures in permanent improvements upon it. The evidence offered is admissible. Specific performance of a parol contract to convey land is decreed in favor of the vendee who has performed his part of the contract, when a failure or refusal to convey would operate as a fraud upon him. Johnson v. Bell, 58 N. H. 395; Kidder v. Barr, 35 N. H. 236, 254; Ayer v. Hawkes, 11 N. H. 148, 154; Tilton v. Tilton, 9 N. H. 385, 390; 2 Sto. Eq. Jur., s. 761. The

statute of frauds (G. L., c. 220, s. 14) provides that "No action shall be maintained upon a contract for the sale of land, unless the agreement upon which it is brought, or some memorandum thereof, is in writing, and signed by the party to be charged, or by some person by him thereto authorized in writing." Equity, however, lends its aid, when there has been part performance, to remove the bar of the statute, upon the ground that it is a fraud for the vendor to insist upon the absence of a written instrument, when he has permitted the contract to be partly executed.

*2 It is not material in this case to know whether the promissory note given up by the plaintiff was or was not intended as payment or part payment for the land, for equity protects a parol gift of land equally with a parol agreement to sell it, if accompanied by possession, and the donee has made valuable improvements upon the property induced by the promise to give it. Stratton v. Stratton, 58 N. H. 474; King v. Thompson, 9 Pet. 204; Neale v. Neales, 9 Wall. 1, 9; Freeman v. Freeman, 43 N. Y. 34; Kurtz v. Hibner, 55 Ill. 514; Bright v. Bright, 41 Ill. 97; Shepherd v. Bevin, 9 Gill 32; McLain v. School Directors, 51 Pa. St. 196; Murphy v. Stell, 43 Tex. 123; Bro. St. Fr., s. 491, a. There is no important distinction in this respect between a promise to give and a promise to sell. The expenditure in money or labor in the improvement of the land induced by the donor's promise to give the land to the party making the expenditure, constitutes, in equity, a consideration for the promise, and the promise will be enforced. Crosbie v. M'Doual, 13 Ves. 148; Freeman v. Freeman, 43 N. Y. 34, 39; 3 Par. Cont. 359.

Case discharged.

ALLEN and CLARK, JJ., did not sit: the others concurred.

proponent's counsel to move for the direction of a verdict precluded the Appellate Division from directing final judgment on the ground that no sufficient evidence of testamentary incapacity was offered on the trial. Such is the rule in jury cases generally. Seeman v. Levine, 205 N. Y. 514, 99 N. E. 158. Surrogate's Court Act (Laws 1920, c. 928) § 309 (Code Civ. Proc. § 2763, without change), provides also that "the appellate court may reverse, affirm, or modify, the decree or order appealed from," but contains no express reference to trials before a jury.

[3] The procedure on trial by jury in the Surrogate's Court has been assimilated to the procedure on jury trials generally (see Matter of Eno, 196 App. Div. 131, 155, 187 N. Y. Supp. 756, where the authorities are collated), but it has never been held by this court that the powers of the Appellate Division to review the decrees of the Surrogate's Court are subject to the same limitations as in an action at law. A supervisory power over the decisions of the Surrogate's Court on the facts has always existed in this state. The review was in the nature of a rehearing in equity. The appellate court examined the case de novo. Jury trials in the Surrogate's Court were first provided for in the year 1914. When the trial is before the surrogate without a jury, the question whether there is any evidence to sustain the decree is open for review without any exception. Burger v. Burger, 111 N. Y. 523, 19 N. E. 99, 21 N. E. 59.

[4] Historically, the power of the Appellate Division to direct final judgment in an action at law tried before a jury rests on the provisions of Code Civ. Proc. § 1317, as amended in 1912. Middleton v. Whitridge, 213 N. Y. 499, 503, 108 N. E. 192, Ann. Cas. 1916C, 856; Peterson v. Ocean Electric Ry. Co., 214 N. Y. 43, 108 N. E. 199. The power of the Appellate Division to direct judgment de novo in probate cases long antedates such amendment. From the nature of things this power is somewhat restricted by the provisions now made for jury trial in which controverted questions of fact actually arise. The disposition of such questions is for a jury. Hagan v. Sone, 174 N. Y. 317, 66 N. E. 973; Middleton v. Whitridge, supra, 213 N. Y. 504, 108 N. E. 192, Ann. Cas. 1916C, 856.

[5] Where the parties to a will contest have had their day in court, where no reason appears why they should have a retrial, where the question of testamentary capacity should not have been submitted to the jury, where the verdict against the will should not have been found, it seems to be a sound principle to be applied in the absence of controlling authority that a new trial should not be ordered simply because the surrogate was not asked to take the question from the jury, but that final judgment directing probate should be rendered by the appellate court.

The order appealed from should be affirmed, with costs payable out of the estate.

HISCOCK, C. J., and HOGAN, CARDOZO, McLAUGHLIN, CRANE, and ANDREWS, JJ., concur.

Order affirmed, etc.

(224 N. Y. 479)

SIEGEL v. SPEAR & CO.

(Court of Appeals of New York. Jan. 16, 1923.)

1. Bailment ⇐12—Chattel mortgage to bailee does not make bailment for hire.

The fact that a bailee, who undertook to store goods for another without compensation, held a chattel mortgage upon the goods did not affect its relationship as a bailee without pay, so that it was not liable for the destruction of the goods by fire, unless due to its gross neglect.

2. Bailment ⇐12—Voluntary bailee is liable for failure to procure insurance as it undertook to do.

Where a voluntary bailee, before the delivery of goods to it, undertook to insure the goods against loss by fire, and the owner of goods relying upon that undertaking delivered them to the bailee and failed himself to procure insurance, the bailee was liable for its failure to procure the insurance as agreed, the delivery of the goods to it in reliance on its undertaking being a sufficient consideration to support the undertaking.

Appeal from Supreme Court, Appellate Division, First Department.

Action by William Siegel against Spear & Co. A determination of the Appellate Term affirming a judgment in favor of plaintiff was affirmed by the Appellate Division (195 App. Div. 845, 187 N. Y. Supp. 284), and defendant appeals by permission. Affirmed.

Alfred A. Walter and Edwin R. Wolff, both of New York City, for appellant.

Lawrence B. Cohen, of New York City, and Gilbert M. Levy, of Brooklyn, for respondent.

CRANE, J. The plaintiff commenced this action in the City Court of the city of New

York, to recover his loss sustained by failure of the defendant to insure his household furniture stored in its storehouse. The action is based upon an alleged agreement to insure, made with the defendant's credit man. So far the plaintiff has been successful, the Appellate Division, however, certifying that in its opinion there is a question of law involved which should be reviewed by this court.

In August of 1917 and January of 1918 the plaintiff purchased of the defendant certain household furniture for the sum of $909.25 and took it to his apartment in New York City. He gave back to the defendant two chattel mortgages, which provided for monthly payments of the purchase price, and also that the furniture should not be removed from the plaintiff's residence without the written consent of the mortgagee.

By May of 1918 the plaintiff had paid in all $295. In that month, desiring to move from the city for the summer months and give up his apartment, the plaintiff went to the defendant's place of business in New York City to see about storing his furniture until his return. It was arranged with the defendant's credit man, McGrath, that the plaintiff should send his furniture by his own truck to the defendant's storehouse, and that the defendant would keep it for him free of charge. It is claimed that McGrath, at the time of making these arrangements, also promised and agreed to insure the furniture for the plaintiff's benefit. The furniture had not been insured by the plaintiff at any time. The conversation is given by Mr. Siegel as follows:

"At that time he said, 'You had better transfer your insurance policy over to our warehouse.' I said: 'I haven't any insurance. I never thought of taking it out, as I never had time to take it out.' But I said: 'Before the furniture comes down I will have my insurance man, who insures my life, have the furniture insured and transferred over to your place.' He said: 'That won't be necessary to get that from him; I will do it for you; it will be a good deal cheaper; I handle lots of insurance; when you get the next bill—you can send a check for that with the next installment.'"

The furniture was sent to the defendant's storehouse about the 15th of May, and about the 15th of the following June was destroyed by fire. No insurance had been placed upon it.

Upon these facts the plaintiff has recovered the amount of his loss. The defendant raises at least two objections to this result. It claims, first, that there was no consideration for the alleged agreement made with McGrath to insure the furniture, and, second, that McGrath had no authority to make any such contract even if he did.

[1] We are inclined to think that if the contract were made—and we must assume it was, as there is evidence to sustain the findings of the jury to this effect—there was in the nature of the case a consideration sufficient to sustain the promise. It is, of course, a fact that the defendant undertook to store the plaintiff's property without any compensation. The fact that it had a chattel mortgage upon the property did not affect its relationship as a bailee without pay. Under these circumstances it was not liable for the destruction of the goods by fire unless due to its gross neglect. Van Zile on Bailments and Carriers, § 98; First Nat. Bank of Lyons v. Ocean Nat. Bank, 60 N. Y. 278, 19 Am. Rep. 181. There is no such element in this case.

[2] But if, in connection with taking the goods, McGrath also voluntarily undertook to procure insurance for the plaintiff's benefit, the promise was part of the whole transaction and was linked up with the gratuitous bailment. The bailee, if such a contract were within McGrath's agency, was then under as much of an obligation to procure insurance as he was to take care of the goods.

When McGrath stated that he would insure the furniture if was still in the plaintiff's possession. It was after his statements and promises that the plaintiff sent the furniture to the storehouse. The defendant or McGrath entered upon the execution of the trust. It is in this particular that this case differs from Thorne v. Deas, 4 Johns. 84, 99, so much relied upon by the defendant. In that case A. and B. were joint owners of a vessel. A. voluntarily undertook to get the vessel insured, but neglected to do so. The vessel having been lost at sea, it was held that no action would lie against A. for the nonperformance of his promise, although B. had relied upon that promise to his loss. It was said that there was no consideration for the promise. In that case there was the mere naked promise of A. that he would insure the vessel. B. parted with nothing to A. He gave up possession of none of his property to A., nor of any interest in his vessel. The case would have been decided differently, no doubt, if he had. As Chancellor Kent said in referring to the earlier cases:

"There was no dispute or doubt but that an action upon the case lay for a misfeasance, in the breach of a trust undertaken voluntarily."

The same may be said regarding the case of Brawn v. Lyford, 103 Me. 362, 69 Atl. 544.

In the case of Rutgers v. Lucet, 2 Johns. Cas. 92, 95, the law on this point was stated to be as follows:

"A mere agreement to undertake a trust, in futuro, without compensation, it is true, is not obligatory; but when once undertaken, and the trust actually entered upon, the bailee is bound to perform it, according to the terms of his agreement. The confidence placed in him, and his undertaking to execute the trust, raise a sufficient consideration; a contrary doctrine would tend to injure and deceive his employer, who might be unwilling to consent to the bailment on any other terms."

In Hammond v. Hussey, 51 N. H. 40, 50 (12 Am. Rep. 41), the court, quoting Professor Parsons, says:

"If a person makes a gratuitous promise, and then enters upon the performance of it, he is held to a full execution of all he has undertaken."

Where one had gratuitously undertaken to carry the money of a bailor to a certain place and deliver it to another, and, after receiving the money, the bailee gave it to a neighbor who undertook to make delivery and lost it, it was held that the bailee had violated his trust in handling the money, that he was guilty of gross negligence in not fulfilling the terms of the bailment. Colyar v. Taylor, 41 Tenn. (1 Cold.) 372; Van Zile on Bailments and Carriers, § 98; Davis v. Gay, 141 Mass. 531, 534, 6 N. E. 549; Isham v. Post, 141 N. Y. 100, 109, 35 N. E. 1084, 23 L. R. A. 90, 38 Am. St. Rep. 768; Glanzer v. Shepard, 233 N. Y. 236, 135 N. E. 275; 6 Ruling Case Law, p. 656, § 67.

From this aspect of the case we think there was a consideration for the agreement to insure. This renders it unnecessary to determine whether the plaintiff, in refraining from insuring through his own agent at the suggestion of McGrath, surrendered any right which would furnish a consideration for McGrath's promise.

I find that Thorne v. Deas, supra, has been seldom cited upon this question of consideration, and whether or not we would feel bound to follow it to-day must be left open until the question comes properly before us.

As to McGrath's authority to act in this matter, we do not find the point raised by any sufficient exception.

For the reasons here stated, the judgment must be affirmed, with costs.

HISCOCK, C. J., and HOGAN, CARDOZO, POUND, McLAUGHLIN, and ANDREWS, JJ., concur.

Judgment affirmed.

(234 N. Y. 434)

PEOPLE ex rel. SHELDON et al. v. BOARD OF APPEALS OF CITY OF NEW YORK et al.

(Court of Appeals of New York. Jan. 16, 1923.)

Municipal corporations ⇐⇒601—Board of Appeals held to have authority to vary zone regulations and to permit business building in restricted residence district.

Under Greater New York Charter, §§ 242-a, 242-b, as added by Laws 1914, c. 470, § 1, amended by Laws 1916, c. 497, §§ 1, 2; Laws 1917, c. 601, §§ 1, 2, and article 20, § 5, Zoning Resolution of Board of Estimate and Apportionment, giving the board of appeals authority to determine and vary the application of the zoning resolution, the board of appeals had authority, in specific cases, to determine that there existed unnecessary hardships in enforcing the strict letter of the zoning resolution, and to modify or alter, in form or substance, the application of the regulations by permitting erection of a business building on lots in part within a district restricted to residence purposes.

Appeal from Supreme Court, Appellate Division, First Department.

Certiorari by the People of the State of New York, on the relation of George R. Sheldon and others, against the Board of Appeals of the City of New York and others, impleaded with others. From an order of the Appellate Division of the Supreme Court (200 App. Div. 907, 192 N. Y. Supp. 945) affirming an order of the Special Term sustaining the writ and annulling and setting aside a determination of the Board of Appeals on the ground that it exceeded its jurisdiction, the respondents appeal. Reversed, and writ dismissed.

John P. O'Brien, Corp. Counsel, of New York City (John F. O'Brien, Willard S. Allen, and William T. Kennedy, all of New York City, of counsel), for appellants Board of Appeals and others.

Henry W. Taft and Paxton Blair, both of New York City, for appellant Farmers' Loan & Trust Co.

John G. Milburn, Walter F. Taylor, and Edwin De T. Bechtel, all of New York City, for respondents.

Edward M. Bassett, amicus curiæ.

HOGAN, J. The Farmers' Loan & Trust Company, as trustee and executor of the last will and testament of William Waldorf Astor, deceased, is owner of eight lots of land each about 95 feet in depth on the westerly side of Madison avenue extending from Thirty-Fifth street on the south to Thirty-Sixth street on the north, also six lots im-

if Dawson had communicated Risley's message to Caldine. If Dibble had performed his duty and, in the absence of written abrogation of permanent orders, had refused to obey Caldine's signal, the gas car would have remained at Bridgewater yard and allowed the freight to take the turntable siding. Dawson knew that the freight was approaching; Dibble ought to have known it and should have kept his car stationary. Negligence was not solely Caldine's. His death resulted in part from the negligence of Dawson and Dibble.

[1-3] Contributory negligence by the deceased will not, under the Federal Employers' Liability Act, necessarily prevent recovery by his personal representative. The defense is good only in mitigation of damages. Chicago, R. I. & P. R. Co. v. Ward, 252 U. S. 18, 40 S. Ct. 275, 64 L. Ed. 430. When several employees of an interstate commerce carrier participate in careless operation of a train, and death results to one of them, the statute imposes liability upon the carrier. A trainman killed in a collision may be found to have been negligent, yet the carrier is not absolved from blame when the dispatcher also is at fault. Union Pac. R. Co. v. Hadley, 246 U. S. 330, 38 S. Ct. 318, 62 L. Ed. 751. If other employees in secondary relation to the movement of trains might, by mere possibility, be deemed negligent, then actual negligence by the deceased is regarded as the sole and proximate cause of his death. Davis v. Kennedy, 266 U. S. 147, 45 S. Ct. 33, 69 L. Ed. 212. Here the negligence of decedent's coemployee Dawson is more than merely possible. It is actual and flagrant. Dibble, the motorman, like Kennedy, the engineer, was in direct control of the car's movement and his failure to await the arrival of the freight was the primary cause of the collision. His duty bound him to disregard the conductor's signal until he was certain that the freight had taken the turntable siding. The conductor's duty was merely secondary to that of the motorman. This, as we understand, conforms with the reasoning in the Kennedy Case, supra.

The judgment of the Appellate Division should be reversed and that of the Trial Term affirmed, with costs in the Appellate Division and in this court.

CARDOZO, C. J., and POUND, CRANE, ANDREWS, and LEHMAN, JJ., concur.

KELLOGG, J., not sitting.

Judgment accordingly.

(246 N. Y. 369)

ALLEGHENY COLLEGE v. NATIONAL CHAUTAUQUA COUNTY BANK OF JAMESTOWN.

Court of Appeals of New York. Nov. 22, 1927.

1. **Subscriptions ⟸5—Promise of charitable subscription is unenforceable if made without consideration.**

A promise of a charitable subscription is unenforceable like any other promise, if made *without consideration.*

2. **Subscriptions ⟸5—Duty of promisee of charitable subscription to perpetuate name of promisor, which duty was condition of promise, held sufficient consideration to give validity to subscription.**

Where one promised a charitable subscription to college on condition of its use as fund in name of promisor for scholarship and paid a portion of such subscription, *held* that implied duty assumed by promisee to perpetuate name of promisor as a founder of fund was a sufficient consideration in itself to give validity to *subscription, and created a bilateral agreement.*

3. **Contracts ⟸56—Bilateral agreement may exist, though one of mutual promises be implied in fact.**

A bilateral agreement may exist, though one of mutual promises be a promise implied in fact, an inference from conduct as opposed to an inference from words.

Kellogg and Andrews, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Allegheny College against the National Chautauqua County Bank of Jamestown, as executor of the last will and testament of Mary Yates Johnston, deceased. From a judgment of the Appellate Division of the Supreme Court in the Fourth Judicial Department (219 App. Div. 852, 221 N. Y. S. 784), affirming a judgment entered upon a decision of the Trial Term of the Supreme Court in favor of the defendant a jury having been waived, plaintiff appeals. Judgments of Appellate Division and Trial Term reversed, and judgment ordered for plaintiff.

See, also, 220 App. Div. 805, 222 N. Y. S. 762.

Clarence G. Pickard and C. A. Pickard, both of Jamestown, and Arthur L. Bates, of Meadville, Pa., for appellant.

Robert H. Jackson, Harry R. Lewis, and Benjamin S. Dean, all of Jamestown, for respondent.

CARDOZO, C. J. The plaintiff, Allegheny College, is an institution of liberal learning at Meadville, Pa. In June, 1921, a "drive" *was in progress to secure for it an additional*

endowment of $1,250,000. An appeal to contribute to this fund was made to Mary Yates Johnston, of Jamestown, New York. In response thereto, she signed and delivered on June 15, 1921, the following writing:

"Estate Pledge, Allegheny College Second Century Endowment.

"Jamestown, N. Y., June 15, 1921.

"In consideration of my interest in Christian education, and in consideration of others subscribing, I hereby subscribe and will pay to the order of the treasurer of Allegheny College, Meadville, Pennsylvania, the sum of five thousand dollars; $5,000.

"This obligation shall become due thirty days after my death, and I hereby instruct my executor, or administrator, to pay the same out of my estate. This pledge shall bear interest at the rate of ——— per cent. per annum, payable annually, from ——— till paid. The proceeds of this obligation shall be added to the Endowment of said Institution, or expended in accordance with instructions on reverse side of this pledge.

"Name: Mary Yates Johnston,

"Address:

306 East 6th Street, Jamestown, N. Y.

"Dayton E. McClain, Witness,

"T. R. Courtis, Witness,

"To authentic signature."

On the reverse side of the writing is the following indorsement:

"In loving memory this gift shall be known as the Mary Yates Johnston memorial fund, the proceeds from which shall be used to educate students preparing for the ministry, either in the United States or in the Foreign Field.

"This pledge shall be valid only on the condition that the provisions of my will, now extant, shall be first met. Mary Yates Johnston."

The subscription was not payable by its terms until 30 days after the death of the promisor. The sum of $1,000 was paid, however, upon account in December, 1923, while the promisor was alive. The college set the money aside to be held as a scholarship fund for the benefit of students preparing for the ministry. Later, in July, 1924, the promisor gave notice to the college that she repudiated the promise. Upon the expiration of 30 days following her death, this action was brought against the executor of her will to recover the unpaid balance.

[1] The law of charitable subscriptions has been a prolific source of controversy in this state and elsewhere. We have held that a promise of that order is unenforceable like any other if made without consideration. Hamilton College v. Stewart, 1 N. Y. 581; Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 403, 8 Am. St. Rep. 767; Twenty-Third St. Baptist Church v. Cornell, 117 N. Y. 601, 23 N. E. 177, 6 L. R. A. 807. On the other hand, though professing to apply to such subscriptions the general law of contract, we have found consideration present where the general law of contract, at least as then declared, would have said that it was absent. Barnes v. Perine, 12 N. Y. 18; Presbyterian Soc. v. Beach, 74 N. Y. 72; Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325; cf. Eastern States League v. Vail, 97 Vt. 495, 508, 124 A. 568, 38 A. L. R. 845, and cases cited; Young Men's Christian Ass'n v. Estill, 140 Ga. 291, 78 S. E. 1075, 48 L. R. A. (N. S.) 783, Ann. Cas. 1914D, 130; Amherst Academy v. Cowles, 6 Pick. (Mass.) 427, 17 Am. Dec. 387; Ladies Collegiate Institute v. French, 16 Gray (Mass.) 196; Martin v. Meles, 179 Mass. 114, 60 N. E. 397; Robinson v. Nutt, 185 Mass. 345, 70 N. E. 198; University of Pennsylvania v. Coxe, 277 Pa. 512, 121 A. 314; Williston, Contracts, § 116.

A classic form of statement identifies consideration with detriment to the promisee sustained by virtue of the promise. Hamer v. Sidway, 124 N. Y. 538, 27 N. E. 256, 12 L. R. A. 403, 21 Am. St. Rep. 693; Anson, Contracts (Corbin's Ed.) p. 116; 8 Holdsworth, History of English Law, 10. So compendious a formula is little more than a half truth. There is need of many a supplementary gloss before the outline can be so filled in as to depict the classic doctrine. "The promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." Wisconsin & Michigan R. Co. v. Powers, 191 U. S. 379, 386, 24 S. Ct. 107, 108 (48 L. Ed. 229); McGovern v. City of New York, 234 N. Y. 377, 389, 138 N. E. 26, 25 A. L. R. 1442; Walton Water Co. v. Village of Walton, 238 N. Y. 46, 51, 143 N. E. 786; 1 Williston, Contracts, § 139; Langdell, Summary of the Law of Contracts, pp. 82–88. If A promises B to make him a gift, consideration may be lacking, though B has renounced other opportunities for betterment in the faith that the promise will be kept.

The half truths of one generation tend at times to perpetuate themselves in the law as the whole truth of another, when constant repetition brings it about that qualifications, taken once for granted, are disregarded or forgotten. The doctrine of consideration has not escaped the common lot. As far back as 1881, Judge Holmes in his lectures on the Common Law (page 292), separated the detriment, which is merely a consequence of the promise from the detriment, which is in truth the motive or inducement, and yet added that the courts "have gone far in obliterating this distinction." The tendency toward effacement has not lessened with the years. On the con-

trary, there has grown up of recent days a doctrine that a substitute for consideration or an exception to its ordinary requirements can be found in what is styled "a promissory estoppel." Williston, Contracts, §§ 139, 116. Whether the exception has made its way in this state to such an extent as to permit us to say that the general law of consideration has been modified accordingly, we do not now attempt to say. Cases such as Siegel v. Spear & Co., 234 N. Y. 479, 138 N. E. 414, 26 A. L. R. 1205, and De Cicco v. Schweizer, 221 N. Y. 431, 117 N. E. 807, L. R. A. 1918E, 1004, Ann. Cas. 1918C, 816, may be signposts on the road. Certain, at least, it is that we have adopted the doctrine of promissory estoppel as the equivalent of consideration in connection with our law of charitable subscriptions. So long as those decisions stand, the question is not merely whether the enforcement of a charitable subscription can be squared with the doctrine of consideration in all its ancient rigor. The question may also be whether it can be squared with the doctrine of consideration as qualified by the doctrine of promissory estoppel.

We have said that the cases in this state have recognized this exception, if exception it is thought to be. Thus, in Barnes v. Perine, 12 N. Y. 18, the subscription was made without request, express or implied, that the church do anything on the faith of it. Later, the church did incur expense to the knowledge of the promisor, and in the reasonable belief that the promise would be kept. We held the promise binding, though consideration there was none except upon the theory of a promissory estoppel. In Presbyterian Society v. Beach, 74 N. Y. 72, a situation substantially the same became the basis for a like ruling. So in Roberts v. Cobb, 103 N. Y. 600, 9 N. E. 500, and Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325, the moulds of consideration as fixed by the old doctrine were subjected to a like expansion. Very likely, conceptions of public policy have shaped, more or less subconsciously, the rulings thus made. Judges have been affected by the thought that "defenses of that character" are "breaches of faith towards the public, and especially towards those engaged in the same enterprise, and an unwarrantable disappointment of the reasonable expectations of those interested." W. F. Allen, J., in Barnes v. Perine, supra, p. 24; and cf. Eastern States League v. Vail, 97 Vt. 495, 505, 124 A. 568, 38 A. L. R. 845, and cases there cited. The result speaks for itself irrespective of the motive. Decisions which have stood so long, and which are supported by so many considerations of public policy and reason, will not be overruled to save the symmetry of a concept which itself came into our law, not so much from any reasoned conviction of its justice, as from historical accidents of practice and procedure. 8 Holdsworth, History of English Law, 7 et seq. The concept survives as one of the distinctive features of our legal system. We have no thought to suggest that it is obsolete or on the way to be abandoned. As in the case of other concepts, however, the pressure of exceptions has led to irregularities of form.

It is in this background of precedent that we are to view the problem now before us. The background helps to an understanding of the implications inherent in subscription and acceptance. This is so though we may find in the end that without recourse to the innovation of promissory estoppel the transaction can be fitted within the mould of consideration as established by tradition.

The promisor wished to have a memorial to perpetuate her name. She imposed a condition that the "gift" should "be known as the Mary Yates Johnston Memorial Fund." The moment that the college accepted $1,000 as a payment on account, there was an assumption of a duty to do whatever acts were customary or reasonably necessary to maintain the memorial fairly and justly in the spirit of its creation. The college could not accept the money and hold itself free thereafter from personal responsibility to give effect to the condition. Dinan v. Coneys, 143 N. Y. 544, 547, 38 N. E. 715; Brown v. Knapp, 79 N. Y. 136; Gridley v. Gridley, 24 N. Y. 130; Grossman v. Schenker, 206 N. Y. 466, 469, 100 N. E. 39; 1 Williston, Contracts, §§ 90, 370. More is involved in the receipt of such a fund than a mere acceptance of money to be held to a corporate use. Cf. Martin v. Meles, 179 Mass. 114, 60 N. E. 397, citing Johnson v. Otterbein University, 41 Ohio St. 527, 531, and Presbyterian Church v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767. The purpose of the founder would be unfairly thwarted or at least inadequately served if the college failed to communicate to the world, or in any event to applicants for the scholarship, the title of the memorial. By implication it undertook, when it accepted a portion of the "gift," that in its circulars of information and in other customary ways when making announcement of this scholarship, it would couple with the announcement the name of the donor. The donor was not at liberty to gain the benefit of such an undertaking upon the payment of a part and disappoint the expectation that there would be payment of the residue. If the college had stated after receiving $1,000 upon account of the subscription, that it would apply the money to the prescribed use, but that in its cir-

culars of information and when responding to prospective applicants it would deal with the fund as an anonymous donation, there is little doubt that the subscriber would have been at liberty to treat this statement as the repudiation of a duty impliedly assumed, a repudiation justifying a refusal to make payments in the future. Obligation in such circumstances is correlative and mutual. A case much in point is New Jersey Hospital v. Wright, 95 N. J. Law, 462, 464, 113 A. 144, where a subscription for the maintenance of a bed in a hospital was held to be enforceable by virtue of an implied promise by the hospital that the bed should be maintained in the name of the subscriber. Cf. Board of Foreign Missions v. Smith, 209 Pa. 361, 58 A. 689. A parallel situation might arise upon the endowment of a chair or a fellowship in a university by the aid of annual payments with the condition that it should commemorate the name of the founder or that of a member of his family. The university would fail to live up to the fair meaning of its promise if it were to publish in its circulars of information and elsewhere the existence of a chair or a fellowship in the prescribed subject, and omit the benefactor's name. A duty to act in ways beneficial to the promisor and beyond the application of the fund to the mere uses of the trust would be cast upon the promisee by the acceptance of the money. We do not need to measure the extent either of benefit to the promisor or of detriment to the promisee implicit in this duty. "If a person chooses to make an extravagant promise for an inadequate consideration, it is his own affair." 8 Holdsworth, History of English Law, p. 17. It was long ago said that "when a thing is to be done by the plaintiff, be it never so small, this is a sufficient consideration to ground an action." Sturlyn v. Albany, 1587, Cro. Eliz. 67, quoted by Holdsworth, supra; cf. Walton Water Co. v. Village of Walton, 238 N. Y. 46, 51, 143 N. E. 786. The longing for posthumous remembrance is an emotion not so weak as to justify us in saying that its gratification is a negligible good.

[2, 3] We think the duty assumed by the plaintiff to perpetuate the name of the founder of the memorial is sufficient in itself to give validity to the subscription within the rules that define consideration for a promise of that order. When the promisee subjected itself to such a duty at the implied request of the promisor, the result was the creation of a bilateral agreement. Williston, Contracts, §§ 60a, 68, 90, 370; Brown v. Knapp, supra; Grossman v. Schenker, supra; Williams College v. Danforth, 12 Pick. (Mass.) 541, 544; Ladies Collegiate Institute v. French, 16 Gray (Mass.) 190, 200. There was a promise on the one side and on the other a return promise, made, it is true, by implication, but expressing an obligation that had been exacted as a condition of the payment. A bilateral agreement may exist though one of the mutual promises be a promise "implied in fact," an inference from conduct as opposed to an inference from words. Williston, Contracts, §§ 90, 22a; Pettibone v. Moore, 75 Hun, 461, 464, 27 N. Y. S. 455. We think the fair inference to be drawn from the acceptance of a payment on account of the subscription is a promise by the college to do what may be necessary on its part to make the scholarship effective. The plan conceived by the subscriber will be mutilated and distorted unless the sum to be accepted is adequate to the end in view. Moreover, the time to affix her name to the memorial will not arrive until the entire fund has been collected. The college may thus thwart the purpose of the payment on account if at liberty to reject a tender of the residue. It is no answer to say that a duty would then arise to make restitution of the money. If such a duty may be imposed, the only reason for its existence must be that there is then a failure of "consideration." To say that there is a failure of consideration is to concede that a consideration has been promised, since otherwise it could not fail. No doubt there are times and situations in which limitations laid upon a promisee in connection with the use of what is paid by a subscriber lack the quality of a consideration, and are to be classed merely as conditions. Williston, Contracts, § 112; Page, Contracts, § 523. "It is often difficult to determine whether words of condition in a promise indicate a request for consideration or state a mere condition in a gratuitous promise. An aid, though not a conclusive test in determining which construction of the promise is more reasonable is an inquiry whether the happening of the condition will be a benefit to the promisor. If so, it is a fair inference that the happening was requested as a consideration." Williston, supra, § 112. Such must be the meaning of this transaction unless we are prepared to hold that the college may keep the payment on account, and thereafter nullify the scholarship which is to preserve the memory of the subscriber. The fair implication to be gathered from the whole transaction is assent to the condition and the assumption of a duty to go forward with performance. De Wolf Co. v. Harvey, 161 Wis. 535, 154 N. W. 988; Pullman Co. v. Meyer, 195 Ala. 397, 401, 70 So. 763; Brauiff v. Baier, 101 Kan. 117, 165 P. 816, L. R. A. 1917E, 1036; cf. Corbin, Offer and Acceptance, 26 Yale L. J. 169, 177, 193; McGovney, Irrevocable Offers, 27 Harv. L. R. 644; Sir Frederick Pollock, 28 L. Q. R. 100, 101. The subscriber does not say: I hand

you $1,000, and you may make up your mind later, after my death, whether you will undertake to commemorate my name. What she says in effect is this: I hand you $1,000, and if you are unwilling to commemorate me, the time to speak is now.

The conclusion thus reached makes it needless to consider whether, aside from the feature of a memorial, a promissory estoppel may result from the assumption of a duty to apply the fund, so far as already paid, to special purposes not mandatory under the provisions of the college charter (the support and education of students preparing for the ministry)—an assumption induced by the belief that other payments sufficient in amount to make the scholarship effective would be added to the fund thereafter upon the death of the subscriber. Ladies Collegiate Institute v. French, 16 Gray (Mass.) 196; Barnes v. Perine, 12 N. Y. 18, and cases there cited.

The judgment of the Appellate Division and that of the Trial Term should be reversed, and judgment ordered for the plaintiff as prayed for in the complaint, with costs in all courts.

KELLOGG, J. (dissenting). The Chief Judge finds in the expression, "In loving memory this gift shall be known as the Mary Yates Johnston Memorial Fund," an offer on the part of Mary Yates Johnston to contract with Allegheny College. The expression makes no such appeal to me. Allegheny College was not requested to perform any act through which the sum offered might bear the title by which the offeror states that it shall be known. The sum offered was termed a "gift" by the offeror. Consequently, I can see no reason why we should strain ourselves to make it, not a gift, but a trade. Moreover, since the donor specified that the gift was made, "In consideration of my interest in Christian education, and in consideration of others subscribing," considerations not adequate in law, I can see no excuse for asserting that it was otherwise made in consideration of an act or promise on the part of the donee, constituting a sufficient quid pro quo to convert the gift into a contract obligation. To me the words used merely expressed an expectation or wish on the part of the donor and failed to exact the return of an adequate consideration. But if an offer indeed was present, then clearly it was an offer to enter into a unilateral contract. The offeror was to be bound provided the offeree performed such acts as might be necessary to make the gift offered become known under the proposed name. This is evidently the thought of the Chief Judge, for he says: "She imposed a condition that the 'gift' should be known as the Mary Yates Johnston Memorial Fund." In other words, she proposed to exchange her offer of a donation in return for acts to be performed. Even so, there was never any acceptance of the offer, and therefore no contract, for the acts requested have never been performed. The gift has never been made known as demanded. Indeed, the requested acts, under the very terms of the assumed offer, could never have been performed at a time to convert the offer into a promise. This is so for the reason that the donation was not to take effect until after the death of the donor, and by her death her offer was withdrawn. Williston on Contracts, § 62. Clearly, although a promise of the college to make the gift known, as requested, may be implied, that promise was not the acceptance of an offer which gave rise to a contract. The donor stipulated for acts, not promises.

"In order to make a bargain it is necessary that the acceptor shall give in return for the offer or the promise exactly the consideration which the offeror requests. If an act is requested, that very act and no other must be given. If a promise is requested, that promise must be made absolutely and unqualifiedly." Williston on Contracts, § 73.

"It does not follow that an offer becomes a promise because it is accepted; it may be, and frequently is, conditional, and then it does not become a promise until the conditions are satisfied; and in case of offers for a consideration, the performance of the consideration is always deemed a condition." Langdell, Summary of the Law of Contracts, § 4.

It seems clear to me that there was here no offer, no acceptance of an offer, and no contract. Neither do I agree with the Chief Judge that this court "found consideration present where the general law of contract, at least as then declared, would have said that it was absent" in the cases of Barnes v. Perine, 12 N. Y. 18, Presbyterian Society v. Beach, 74 N. Y. 72, and Keuka College v. Ray, 167 N. Y. 96, 60 N. E. 325. In the Keuka College Case an offer to contract, in consideration of the performance of certain acts by the offeree, was converted into a promise by the actual performance of those acts. This form of contract has been known to the law from time immemorial (Langdell, § 46), and for at least a century longer than the other type, a bilateral contract (Williston, § 13). It may be that the basis of the decisions in Barnes v. Perine and Presbyterian Society v. Beach, supra, was the same as in the Keuka College Case. See Presbyterian Church of Albany v. Cooper, 112 N. Y. 517, 20 N. E. 352, 3 L. R. A. 468, 8 Am. St. Rep. 767. However, even if the basis of the decisions be a so-called "promissory estoppel," nevertheless they initi-

ated no new doctrine. A so-called "promissory estoppel," although not so termed, was held sufficient by Lord Mansfield and his fellow judges as far back as the year 1765. Pillans v. Van Mierop, 3 Burr. 1663. Such a doctrine may be an anomaly; it is not a novelty. Therefore I can see no ground for the suggestion that the ancient rule which makes consideration necessary to the formation of every contract is in danger of effacement through any decisions of this court. To me that is a cause for gratulation rather than regret. However, the discussion may be beside the mark, for I do not understand that the holding about to be made in this case is other than a holding that consideration was given to convert the offer into a promise. With that result I cannot agree and, accordingly, must dissent.

POUND, CRANE, LEHMAN, and O'BRIEN, JJ., concur with CARDOZO, C. J.

KELLOGG, J., dissents in opinion, in which ANDREWS, J., concurs.

Judgment accordingly.

(216 N. Y. 382)

FERRARI v. FIRST NAT. BANK OF CONNELLSVILLE, PA.

Court of Appeals of New York. Nov. 22, 1927.

1. Banks and banking ⇐188½—Small bank agreeing to establish foreign credit, discharged its obligation if in ordinary course of business it established credit through agent or intermediary.

Small local inland bank, which agreed to establish foreign credit to pay checks drawn by it on foreign bank, performed its full duty if it conformed to ordinary course of business, and had a right to expect that checks would be paid when presented under ordinary circumstances, and it might employ an intermediary to establish credit.

2. Banks and banking ⇐188½—Bank agreeing to establish foreign credit to pay checks held discharged as matter of law, where holders delayed 11 months in presenting checks until credit established was lost, unless there was representation inducing delay; "unreasonable delay" (Negotiable Instruments Law, § 322).

Bank which agreed to establish foreign credit to pay checks drawn by it on foreign bank *held* discharged from liability as a matter of law, where holders delayed over 11 months in presenting checks, during which time credit established to pay them by bank's agent was lost by reason of agent's bankruptcy, unless there was representation inducing belief that promptness was unnecessary, since there was "unreasonable delay" within Negotiable Instruments Law (Consol. Laws, c. 38) § 322, and loss was caused by delay.

[Ed. Note.—For other definitions, see Words and Phrases, First and Second Series, Unreasonable Delay.]

3. Banks and banking ⇐188½—Bank establishing foreign credit was not liable as for withdrawing credit because trustee in bankruptcy of its agent withdrew it.

Bank, which agreed to establish foreign credit to pay checks drawn by it on foreign bank and fulfilled agreement by agent, *held* not liable as for withdrawal of credit because trustee in bankruptcy thereafter appointed for agent withdrew credit under order of federal District Court.

Pound, Crane, and Kellogg, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, First Department.

Action by Francis M. Ferrari against the First National Bank of Connellsville, Pa. Judgment in favor of plaintiff upon a directed verdict (127 Misc. Rep. 330, 216 N. Y. S. 280) was affirmed by the Appellate Division (219 App. Div. 817, 220 N. Y. S. 853), and defendant appeals. Judgment reversed, and new trial granted.

See, also, 220 App. Div. 711, 221 N. Y. S. 821.

Harold Nathan, John B. Doyle, Mortimer Brenner, and Chester Rohrlich, all of New York City, for appellant.

A. S. Cutler, of New York City, and David L. Weissman, for respondent.

O'BRIEN, J. The complaint alleges that defendant agreed with plaintiff's assignors to establish a credit with the Banca Commerciale Italiana of Rome, amounting to 38,000 lire, that defendant failed, neglected, and refused to establish any credit with that bank, and, because no such credit had ever been established, that drafts amounting to 38,000 lire, issued by defendant to plaintiff's assignors, were dishonored and payment refused.

By stipulation at the trial and by evidence, certain facts were proved. On September 5, 1922, plaintiff's assignors paid $1,072 to defendant and received in return four checks on the Banca Commerciale aggregating 38,000 lire. On September 8 defendant deposited $1,061.55 with Knauth, Nachod & Kuhne at New York for the purpose of paying the four checks on presentation, and on the same day Knauth, Nachod & Kuhne notified the Banca Commerciale to pay the checks on presentation and to debit their account in the amount of the checks. From September 8, 1922, until June 8, 1923, that firm had a credit balance with the Banca Commerciale in excess of all its outstanding debits. It was engaged

same rules as though she had refused to answer any other pertinent written or oral interrogatories."

Upon her refusal to answer, the defendant's claim was properly dismissed by the Workmen's Compensation Commission but the defendant could not be charged with contempt for claiming her immunity.

It follows that the trial court correctly ruled upon the motion, and its judgment is affirmed.

ANDERSON and RUDDY, JJ., concur.

Anna Sacks FEINBERG (Plaintiff), Respondent,

v.

PFEIFFER COMPANY, a Corporation, Formerly Known as S. Pfeiffer Manufacturing Co., a Corporation (Defendant), Appellant.

Nos. 30183, 30204.

St. Louis Court of Appeals.

Missouri.

March 17, 1959.

Motion for Rehearing or for Transfer to Supreme Court Denied April 13, 1959.

Action on alleged contract by defendant to pay plaintiff a specified monthly amount for life upon her retirement from defendant's employ. The Circuit Court, City of St. Louis, John C. Casey, J., rendered judgment for plaintiff, and defendant appealed. The St. Louis Court of Appeals, Doerner, C., held that plaintiff's retirement from her lucrative position in reliance upon defendant's promise to pay her a pension for life constituted sufficient consideration to support agreement to pay pension, and that plaintiff could recover thereunder even though she had not discovered cancer which made her unemployable until after defendant had discontinued pension payments.

Affirmed.

1. Appeal and Error ⇐837(11)

In jury-waived case, reviewing court considers only such evidence as is admissible, and is not required to pass upon questions of error in admission and exclusion of evidence. Section 510.310 RSMo 1949, V.A.M.S.

2. Appeal and Error ⇐1170(7)

Error, if any, in admission of evidence would not be ground for reversal in jury-waived case. Sections 510.310, 512.160 RSMo 1949, V.A.M.S.

3. Master and Servant ⇐78.1(9)

In action on alleged contract by defendant to pay plaintiff a specified monthly amount for life upon her retirement from defendant's employ, evidence justified finding that plaintiff would not have quit defendant's employ had she not known and relied upon promise of defendant to pay monthly sum for life, and finding that, after date of her voluntary retirement, she had relied upon continued receipt of pension installments.

4. Master and Servant ⇐78.1(9)

In action on alleged contract by defendant to pay plaintiff a specified monthly amount for life upon her retirement from defendant's employ, evidence would not sustain plaintiff's contention that defendant's promise to pay pension had been predicated upon plaintiff's continuing in defendant's employ and that she had continued in defendant's employ in return for its promise to pay her pension.

5. Contracts ⇐10(1)

Mutuality of obligation is essential to validity of contract.

6. Contracts ⇐51, 52

Consideration sufficient to support a contract may be either a benefit to promisor or loss or detriment to promisee.

7. Evidence ⇐15

It is a matter of common knowledge that it is virtually impossible for a woman 63 years of age to find satisfactory employment.

8. Master and Servant ⇐78.1(3, 6)

Plaintiff's retirement from her lucrative position in defendant's employ in reliance upon defendant's promise to pay her a pension for life constituted sufficient consideration to support agreement to pay pension; and plaintiff could recover thereunder even though she had not discovered cancer which made her unemployable until after defendant had discontinued pension payments.

Robert S. Allen; Lewis, Rice, Tucker, Allen & Chubb, St. Louis, for appellant.

J. Leonard Kline, Sylvan Agatstein, St. Louis, for respondent.

DOERNER, Commissioner.

This is a suit brought in the Circuit Court of the City of St. Louis by plaintiff, a former employee of the defendant corporation, on an alleged contract whereby defendant agreed to pay plaintiff the sum of $200 per month for life upon her retirement. A jury being waived, the case was tried by the court alone. Judgment below was for plaintiff for $5,100, the amount of the pension claimed to be due as of the date of the trial, together with interest thereon, and defendant duly appealed.

The parties are in substantial agreement on the essential facts. Plaintiff began working for the defendant, a manufacturer of pharmaceuticals, in 1910, when she was but 17 years of age. By 1947 she had attained the position of bookkeeper, office manager, and assistant treasurer of the defendant, and owned 70 shares of its stock out of a total of 6,503 shares issued and outstanding. Twenty shares had been given to her by the defendant or its then president, she had purchased 20, and the remaining 30 she had acquired by a stock split or stock dividend. Over the years she received substantial dividends on the stock she owned, as did all of the other stockholders. Also, in addition to her salary, plaintiff from 1937 to 1949, inclusive, received each year a bonus varying in amount from $300 in the beginning to $2,000 in the later years.

On December 27, 1947, the annual meeting of the defendant's Board of Directors was held at the Company's offices in St. Louis, presided over by Max Lippman, its then president and largest individual stockholder. The other directors present were George L. Marcus, Sidney Harris, Sol Flammer, and Walter Weinstock, who, with Max Lippman, owned 5,007 of the 6,503 shares then issued and outstanding. At that meeting the Board of Directors adopted the following resolution, which, because it is the crux of the case, we quote in full:

> "The Chairman thereupon pointed out that the Assistant Treasurer, Mrs. Anna Sacks Feinberg, has given the corporation many years of long and faithful service. Not only has she served the corporation devotedly, but with exceptional ability and skill. The President pointed out that although all of the officers and directors sincerely hoped and desired that Mrs. Feinberg would continue in her present position for as long as she felt able, nevertheless, in view of the length of service which she has contributed provision should be made to afford her retirement privileges and benefits which should become a firm obligation of the corporation to be available to her whenever she should see fit to retire from active duty, however many years in the future such retirement may become effective. It was, accordingly,

proposed that Mrs. Feinberg's salary which is presently $350.00 per month, be increased to $400.00 per month, and that Mrs. Feinberg would be given the privilege of retiring from active duty at any time she may elect to see fit so to do upon a retirement pay of $200.00 per month for life, with the distinct understanding that the retirement plan is merely being adopted at the present time in order to afford Mrs. Feinberg security for the future and in the hope that her active services will continue with the corporation for many years to come. After due discussion and consideration, and upon motion duly made and seconded, it was—

"Resolved, that the salary of Anna Sacks Feinberg be increased from $350.00 to $400.00 per month and that she be afforded the privilege of retiring from active duty in the corporation at any time she may elect to see fit so to do upon retirement pay of $200.00 per month, for the remainder of her life."

At the request of Mr. Lippman his sons-in-law, Messrs. Harris and Flammer, called upon the plaintiff at her apartment on the same day to advise her of the passage of the resolution. Plaintiff testified on cross-examination that she had no prior information that such a pension plan was contemplated, that it came as a surprise to her, and that she would have continued in her employment whether or not such a resolution had been adopted. It is clear from the evidence that there was no contract, oral or written, as to plaintiff's length of employment, and that she was free to quit, and the defendant to discharge her, at any time.

Plaintiff did continue to work for the defendant through June 30, 1949, on which date she retired. In accordance with the foregoing resolution, the defendant began paying her the sum of $200 on the first of each month. Mr. Lippman died on November 18, 1949, and was succeeded as president of the company by his widow. Because of an illness, she retired from that office and was succeeded in October, 1953, by her son-in-law, Sidney M. Harris. Mr. Harris testified that while Mrs. Lippman had been president she signed the monthly pension check paid plaintiff, but fussed about doing so, and considered the payments as gifts. After his election, he stated, a new accounting firm employed by the defendant questioned the validity of the payments to plaintiff on several occasions, and in the Spring of 1956, upon its recommendation, he consulted the Company's then attorney, Mr. Ralph Kalish. Harris testified that both Ernst and Ernst, the accounting firm, and Kalish told him there was no need of giving plaintiff the money. He also stated that he had concurred in the view that the payments to plaintiff were mere gratuities rather than amounts due under a contractual obligation, and that following his discussion with the Company's attorney plaintiff was sent a check for $100 on April 1, 1956. Plaintiff declined to accept the reduced amount, and this action followed. Additional facts will be referred to later in this opinion.

[1, 2] Appellant's first assignment of error relates to the admission in evidence of plaintiff's testimony over its objection, that at the time of trial she was sixty-five and a half years old, and that she was no longer able to engage in gainful employment because of the removal of a cancer and the performance of a colocholecystostomy operation on November 25, 1957. Its complaint is not so much that such evidence was irrelevant and immaterial, as it is that the trial court erroneously made it one basis for its decision in favor of plaintiff. As defendant concedes, the error (if it was error) in the admission of such evidence would not be a ground for reversal, since, this being a jury-waived case, we are constrained by the statutes to review it upon both the law and the evidence, Sec. 510.310 RSMo 1949, V.A.M.S., and to render such judgment as the court below ought

to have given. Section 512.160, Minor v. Lillard, Mo., 289 S.W.2d 1; Thumm v. Lohr, Mo.App., 306 S.W.2d 604. We consider only such evidence as is admissible, and need not pass upon questions of error in the admission and exclusion of evidence. Hussey v. Robison, Mo., 285 S.W.2d 603. However, in fairness to the trial court it should be stated that while he briefly referred to the state of plaintiff's health as of the time of the trial in his amended findings of fact, it is obvious from his amended grounds for decision and judgment that it was not, as will be seen, the basis for his decision.

[3] Appellant's next complaint is that there was insufficient evidence to support the court's findings that plaintiff would not have quit defendant's employ had she not known and relied upon the promise of defendant to pay her $200 a month for life, and the finding that, from her voluntary retirement until April 1, 1956, plaintiff relied upon the continued receipt of the pension installments. The trial court so found, and, in our opinion, justifiably so. Plaintiff testified, and was corroborated by Harris, defendant's witness, that knowledge of the passage of the resolution was communicated to her on December 27, 1947, the very day it was adopted. She was told at that time by Harris and Flammer, she stated, that she could take the pension as of that day, if she wished. She testified further that she continued to work for another year and a half, through June 30, 1949; that at that time her health was good and she could have continued to work, but that after working for almost forty years she thought she would take a rest. Her testimony continued:

"Q. Now, what was the reason—I'm sorry. Did you then quit the employment of the company after you—after this year and a half? A. Yes.

"Q. What was the reason that you left? A. Well, I thought almost forty years, it was a long time and I thought I would take a little rest.

"Q. Yes. A. And with the pension and what earnings my husband had, we figured we could get along.

"Q. Did you rely upon this pension? A. We certainly did.

"Q. Being paid? A. Very much so. We relied upon it because I was positive that I was going to get it as long as I lived.

"Q. Would you have left the employment of the company at that time had it not been for this pension? A. No.

"Mr. Allen: Just a minute, I object to that as calling for a conclusion and conjecture on the part of this witness.

"The Court: It will be overruled.

"Q. (Mr. Agatstein continuing): Go ahead, now. The question is whether you would have quit the employment of the company at that time had you not relied upon this pension plan? A. No, I wouldn't.

"Q. You would not have. Did you ever seek employment while this pension was being paid to you—A. (interrupting): No.

"Q. Wait a minute, at any time prior—at any other place? A. No, sir.

"Q. Were you able to hold any other employment during that time? A. Yes, I think so.

"Q. Was your health good? A. My health was good."

It is obvious from the foregoing that there was ample evidence to support the findings of fact made by the court below.

We come, then, to the basic issue in the case. While otherwise defined in defendant's third and fourth assignments of error, it is thus succinctly stated in the argument in its brief: "* * * whether plaintiff has proved that she has a right to recover from defendant based upon a legally bind-

ing contractual obligation to pay her $200 per month for life."

It is defendant's contention, in essence, that the resolution adopted by its Board of Directors was a mere promise to make a gift, and that no contract resulted either thereby, or when plaintiff retired, because there was no consideration given or paid by the plaintiff. It urges that a promise to make a gift is not binding unless supported by a legal consideration; that the only apparent consideration for the adoption of the foregoing resolution was the "many years of long and faithful service" expressed therein; and that past services are not a valid consideration for a promise. Defendant argues further that there is nothing in the resolution which made its effectiveness conditional upon plaintiff's continued employment, that she was not under contract to work for any length of time but was free to quit whenever she wished, and that she had no contractual right to her position and could have been discharged at any time.

Plaintiff concedes that a promise based upon past services would be without consideration, but contends that there were two other elements which supplied the required element: First, the continuation by plaintiff in the employ of the defendant for the period from December 27, 1947, the date when the resolution was adopted, until the date of her retirement on June 30, 1949. And, second, her change of position, i. e., her retirement, and the abandonment by her of her opportunity to continue in gainful employment, made in reliance on defendant's promise to pay her $200 per month for life.

[4, 5] We must agree with the defendant that the evidence does not support the first of these contentions. There is no language in the resolution predicating plaintiff's right to a pension upon her continued employment. She was not required to work for the defendant for any period of time as a condition to gaining such retirement benefits. She was told that she could quit the day upon which the resolution was adopted, as she herself testified, and it is clear from her own testimony that she made no promise or agreement to continue in the employ of the defendant in return for its promise to pay her a pension. Hence there was lacking that mutuality of obligation which is essential to the validity of a contract. Middleton v. Holecraft, Mo.App., 270 S.W. 2d 90; Solace v. T. J. Moss Tie Co., Mo. App., 142 S.W.2d 1079; Aslin v. Stoddard County, 341 Mo. 138, 106 S.W.2d 472; Fuqua v. Lumbermen's Supply Co., 229 Mo.App. 210, 76 S.W.2d 715; Hudson v. Browning, 264 Mo. 58, 174 S.W. 393; Campbell v. American Handle Co., 117 Mo.App. 19, 94 S.W. 815.

[6-8] But as to the second of these contentions we must agree with plaintiff. By the terms of the resolution defendant promised to pay plaintiff the sum of $200 a month upon her retirement. Consideration for a promise has been defined in the Restatement of the Law of Contracts, Section 75, as:

> "(1) Consideration for a promise is
> (a) an act other than a promise, or
> (b) a forbearance, or
> (c) the creation, modification or destruction of a legal relation, or
> (d) a return promise,
> bargained for and given in exchange for the promise."

As the parties agree, the consideration sufficient to support a contract may be either a benefit to the promisor or a loss or detriment to the promisee. Industrial Bank & Trust Co. v. Hesselberg, Mo., 195 S.W. 2d 470; State ex rel. Kansas City v. State Highway Commission, 349 Mo. 865, 163 S.W.2d 948; Duvall v. Duncan, 341 Mo. 1129, 111 S.W.2d 89; Thompson v. McCune, 333 Mo. 758, 63 S.W.2d 41.

Section 90 of the Restatement of the Law of Contracts states 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." This doctrine has been described as that of "promissory estoppel," as distinguished from that of equitable estoppel or estoppel in pais, the reason for the differentiation being stated as follows:

> "It is generally true that one who has led another to act in reasonable reliance on his representations of fact cannot afterwards in litigation between the two deny the truth of the representations, and some courts have sought to apply this principle to the formation of contracts, where, relying on a gratuitous promise, the promisee has suffered detriment. It is to be noticed, however, that such a case does not come within the ordinary definition of estoppel. If there is any representation of an existing fact, it is only that the promisor at the time of making the promise intends to fulfill it. As to such intention there is usually no misrepresentation and if there is, it is not that which has injured the promisee. In other words, he relies on a promise and not on a misstatement of fact; and the term 'promissory' estoppel or something equivalent should be used to make the distinction." Williston on Contracts, Rev. Ed., Sec. 139, Vol. 1.

In speaking of this doctrine, Judge Learned Hand said in Porter v. Commissioner of Internal Revenue, 2 Cir., 60 F.2d 673, 675, that "* * * 'promissory estoppel' is now a recognized species of consideration."

As pointed out by our Supreme Court in In re Jamison's Estate, Mo., 202 S. W.2d 879, 887, it is stated in the Missouri Annotations to the Restatement under Section 90 that:

> "'There is a variance between the doctrine underlying this section and the theoretical justifications that have been advanced for the Missouri decisions.'"

That variance, as the authors of the Annotations point out, is that:

> "This § 90, when applied with § 85, means that the promise described is a contract without any consideration. In Missouri the same practical result is reached without in theory abandoning the doctrine of consideration. In Missouri three theories have been advanced as ground for the decisions (1) *Theory of act for promise.* The induced 'action or forbearance' is the consideration for the promise. Underwood Typewriter Co. v. Century Realty Co. (1909) 220 Mo. 522, 119 S.W. 400, 25 L.R.A., N.S., 1173. See § 76. (2) *Theory of promissory estoppel.* The induced 'action or forbearance' works an estoppel against the promisor. (Citing School District of Kansas City v. Sheidley (1897) 138 Mo. 672, 40 S. W. 656 [37 L.R.A. 406]) * * * (3) *Theory of bilateral contract.* When the induced 'action or forbearance' is begun, a promise to complete is implied, and we have an enforceable bilateral contract, the implied promise to complete being the consideration for the original promise." (Citing cases.)

Was there such an act on the part of plaintiff, in reliance upon the promise contained in the resolution, as will estop the defendant, and therefore create an enforceable contract under the doctrine of promissory estoppel? We think there was. One of the illustrations cited under Section 90 of the Restatement is: "2. A promises B to pay him an annuity during B's life. B thereupon resigns a profitable employment, as A expected that he might. B receives the annuity for some years, in the meantime becoming disqualified from again obtaining good employment. A's promise is binding." This illustration is objected to by defendant as not being applicable to the case at hand. The reason advanced by it is

that in the illustration B became "disqualified" from obtaining other employment *before* A discontinued the payments, whereas in this case the plaintiff did not discover that she had cancer and thereby became unemployable until *after* the defendant had discontinued the payments of $200 per month. We think the distinction is immaterial. The only reason for the reference in the illustration to the disqualification of A is in connection with that part of Section 90 regarding the prevention of injustice. The injustice would occur regardless of when the disability occurred. Would defendant contend that the contract would be enforceable if the plaintiff's illness had been discovered on March 31, 1956, the day before it discontinued the payment of the $200 a month, but not if it occurred on April 2nd, the day after? Furthermore, there are more ways to become disqualified for work, or unemployable, than as the result of illness. At the time she retired plaintiff was 57 years of age. At the time the payments were discontinued she was over 63 years of age. It is a matter of common knowledge that it is virtually impossible for a woman of that age to find satisfactory employment, much less a position comparable to that which plaintiff enjoyed at the time of her retirement.

The fact of the matter is that plaintiff's subsequent illness was not the "action or forbearance" which was induced by the promise contained in the resolution. As the trial court correctly decided, such action on plaintiff's part was her retirement from a lucrative position in reliance upon defendant's promise to pay her an annuity or pension. In a very similar case, Ricketts v. Scothorn, 57 Neb. 51, 77 N.W. 365, 367, 42 L.R.A. 794, the Supreme Court of Nebraska said:

> "* * * According to the undisputed proof, as shown by the record before us, the plaintiff was a working girl, holding a position in which she earned a salary of $10 per week. Her grandfather, desiring to put her in a position of independence, gave her the note accompanying it with the remark that his other grandchildren did not work, and that she would not be obliged to work any longer. In effect, he suggested that she might abandon her employment, and rely in the future upon the bounty which he promised. He doubtless desired that she should give up her occupation, but, whether he did or not, it is entirely certain that he contemplated such action on her part as a reasonable and probable consequence of his gift. Having intentionally influenced the plaintiff to alter her position for the worse on the faith of the note being paid when due, it would be grossly inequitable to permit the maker, or his executor, to resist payment on the ground that the promise was given without consideration."

The Commissioner therefore recommends, for the reasons stated, that the judgment be affirmed.

PER CURIAM.

The foregoing opinion by DOERNER, C., is adopted as the opinion of the court. The judgment is, accordingly, affirmed.

WOLFE, P. J., and ANDERSON and RUDDY, JJ., concur.

record the stairs were in open and plain sight, and no credible evidence exists from which a reasonable inference of negligence could be drawn.

Judgment affirmed.

26 Wis.2d 683

Joseph HOFFMAN et al., Respondents,

v.

RED OWL STORES, INC., a foreign corp., et al., Appellants.

Supreme Court of Wisconsin.

March 2, 1965.

Rehearing Denied April 27, 1965.

Action for damages. The Circuit Court for Outagamie County, A. W. Parnell, J., entered judgment approving all portions of verdict except for damages as to one item and the defendants appealed and the plaintiffs cross-appealed. The Supreme Court, Currie, C. J., held that court concluded that injustice would result if plaintiffs were not granted damages because of failure of corporation to keep promises made concerning operation of franchise agency store by plaintiffs who had been induced to act to their detriment by those promises.

Order affirmed.

1. Fraud ⇐12

Action at law for fraud cannot be predicated on unfulfilled promises unless promisor possessed present intent not to perform.

2. Estoppel ⇐85

If the only way to avoid injustice is by enforcement of promise which should reasonably be expected by promisor to induce action or forbearance of definite and substantial character on part of promisee and which does induce such action or forbearance, promise is binding.

3. Estoppel ⇐118

Findings that representatives of corporation had made promissory representations to plaintiffs that if they fulfilled certain conditions they would establish them as franchise operators of store in particular town and that in reliance thereon and in the exercise of ordinary care plaintiffs fulfilled conditions required of them by terms of negotiations with corporation were supported by ample evidence.

4. Estoppel ⇐85

Doctrine of promissory estoppel does not require that promise giving rise to cause of action must be so comprehensive as to meet requirements of an offer that would ripen into a contract if accepted by promisee.

5. Estoppel ⇐119

With respect to doctrine of promissory estoppel, the requirements that promise must be one that promisor should reasonably expect to induce action or forbearance of definite and substantial character on part of promisee and that promise did induce such action or forbearance present issues of fact which would ordinarily be resolved by jury, and the third requirement that remedy can only be invoked when necessary to avoid injustice involves policy decision by court which necessarily embraces element of discretion.

6. Estoppel ⇐85

Court concluded that injustice would result if plaintiffs were not granted some relief because of failure of corporation to keep promises concerning franchise agency store to be operated by plaintiffs who were induced to act to their detriment.

7. Estoppel ⇐97

Ordinarily, only promisee and not third persons is entitled to enforce remedy of

promissory estoppel against the promisor, but if promisor actually foresees, or has reason to foresee, action by third person in reliance on promise, it may be unjust to refuse to perform the promise.

8. Estoppel ⇐97

Where corporation which made promises which induced sale of property held by plaintiffs in joint tenancy not only foresaw that it would be necessary for wife to sell joint interest in building but actually requested that the same be done, both plaintiff husband and wife were entitled to damages for loss incurred by each in the sale.

9. Estoppel ⇐99

Plaintiffs were entitled to recover, as damages, the $1,000 paid on $6,000 lot from defendants who had made promissory representations to induce such purchase even though the remaining $5,000 of purchase price was due and unpaid at time negotiations between plaintiffs and defendants fell through, since payment of $1,000 gave an equity in lot which could not be legally foreclosed without affording plaintiffs opportunity to pay balance.

10. Estoppel ⇐99

Where plaintiffs had paid $1,000 down for purchase of lot after being induced to do so by promissory representations of defendants they were not required to invest the additional $5,000 due on lot after negotiations with defendants fell through in order to recover from defendants the $1,000 paid as damages.

11. Estoppel ⇐99

Payment of $125 for one month's rent of home in town where plaintiffs had been led to believe by promissory representations of defendants that they would be entitled to establish a franchised agency store was reasonable and it was a proper item of damages to be assessed against defendants which failed to keep promise.

12. Estoppel ⇐99

Moving expense incurred by plaintiffs in reliance on defendants' promises concerning franchise agency store were a proper item of damages where such expenses would not have been incurred if plaintiffs had not sold their property in reliance on promises.

13. Estoppel ⇐99

Damages awarded in case based on promissory estoppel doctrine should be only such as in opinion of court are necessary to prevent injustice, and mechanical or rule of thumb approaches to damage problem should be avoided.

14. Estoppel ⇐99

Justice did not require that damages awarded plaintiffs because of loss on sale of assets at behest of defendants' promissory representations should exceed any actual loss sustained measured by the difference between sale price and the fair market value.

15. New Trial ⇐70

Since large award of damages arising from sale of grocery business by plaintiffs was not sustained by evidence in action for damages based on promissory estoppel, trial court properly ordered new trial on this issue.

Action by Joseph Hoffman (hereinafter "Hoffman") and wife, plaintiffs, against defendants Red Owl Stores, Inc. (hereinafter "Red Owl") and Edward Lukowitz.

The complaint alleged that Lukowitz, as agent for Red Owl, represented to and agreed with plaintiffs that Red Owl would build a store building in Chilton and stock it with merchandise for Hoffman to operate in return for which plaintiffs were to put up and invest a total sum of $18,000; that in reliance upon the above mentioned agreement and representations plaintiffs

sold their bakery building and business and their grocery store and business; also in reliance on the agreement and representations Hoffman purchased the building site in Chilton and rented a residence for himself and his family in Chilton; plaintiffs' actions in reliance on the representations and agreement disrupted their personal and business life; plaintiffs lost substantial amounts of income and expended large sums of money as expenses. Plaintiffs demanded recovery of damages for the breach of defendants' representations and agreements.

The action was tried to a court and jury. The facts hereafter stated are taken from the evidence adduced at the trial. Where there was a conflict in the evidence the version favorable to plaintiffs has been accepted since the verdict rendered was in favor of plaintiffs.

Hoffman assisted by his wife operated a bakery at Wautoma from 1956 until sale of the building late in 1961. The building was owned in joint tenancy by him and his wife. Red Owl is a Minnesota corporation having its home office at Hopkins, Minnnesota. It owns and operates a number of grocery supermarket stores and also extends franchises to agency stores which are owned by individuals, partnerships and corporations. Lukowitz resides at Green Bay and since September, 1960, has been divisional manager for Red Owl in a territory comprising Upper Michigan and most of Wisconsin in charge of 84 stores. Prior to September, 1960, he was district manager having charge of approximately 20 stores.

In November, 1959, Hoffman was desirous of expanding his operations by establishing a grocery store and contacted a Red Owl representative by the name of Jansen, now deceased. Numerous conversations were had in 1960 with the idea of establishing a Red Owl franchise store in Wautoma. In September, 1960, Lukowitz succeeded Jansen as Red Owl's representative in the negotiations. Hoffman mentioned that $18,000 was all the capital he had available to invest and he was repeatedly assured that this would be sufficient to set him up in business as a Red Owl store. About Christmastime, 1960, Hoffman thought it would be a good idea if he bought a small grocery store in Wautoma and operated it in order that he gain experience in the grocery business prior to operating a Red Owl store in some larger community. On February 6, 1961, on the advice of Lukowitz and Sykes, who had succeeded Lukowitz as Red Owl's district manager, Hoffman bought the inventory and fixtures of a small grocery store in Wautoma and leased the building in which it was operated.

After three months of operating this Wautoma store, the Red Owl representatives came in and took inventory and checked the operations and found the store was operating at a profit. Lukowitz advised Hoffman to sell the store to his manager, and assured him that Red Owl would find a larger store for him elsewhere. Acting on this advice and assurance, Hoffman sold the fixtures and inventory to his manager on June 6, 1961. Hoffman was reluctant to sell at that time because it meant losing the summer tourist business, but he sold on the assurance that he would be operating in a new location by fall and that he must sell this store if he wanted a bigger one. Before selling, Hoffman told the Red Owl representatives that he had $18,000 for "getting set up in business" and they assured him that there would be no problems in establishing him in a bigger operation. The makeup of the $18,000 was not discussed; it was understood plaintiff's father-in-law would furnish part of it. By June, 1961, the towns for the new grocery store had been narrowed down to two, Kewaunee and Chilton. In Kewaunee, Red Owl had an option on a building site. In Chilton, Red Owl had nothing under option, but it did select a site to which plaintiff obtained an option at Red Owl's suggestion. The option stipulated a purchase price of $6,000 with $1,000 to be paid

on election to purchase and the balance to be paid within 30 days. On Lukowitz's assurance that everything was all set plaintiff paid $1,000 down on the lot on September 15th.

On September 27, 1961, plaintiff met at Chilton with Lukowitz and Mr. Reymund and Mr. Carlson from the home office who prepared a projected financial statement. Part of the funds plaintiffs were to supply as their investment in the venture were to be obtained by sale of their Wautoma bakery building.

On the basis of this meeting Lukowitz assured Hoffman: "* * * [E]verything is ready to go. Get your money together and we are set." Shortly after this meeting Lukowitz told plaintiffs that they would have to sell their bakery business and bakery building, and that their retaining this property was the only "hitch" in the entire plan. On November 6, 1961, plaintiffs sold their bakery building for $10,000. Hoffman was to retain the bakery equipment as he contemplated using it to operate a bakery in connection with his Red Owl store. After sale of the bakery Hoffman obtained employment on the night shift at an Appleton bakery.

The record contains different exhibits which were prepared in September and October, some of which were projections of the fiscal operation of the business and others were proposed building and floor plans. Red Owl was to procure some third party to buy the Chilton lot from Hoffman, construct the building, and then lease it to Hoffman. No final plans were ever made, nor were bids let or a construction contract entered. Some time prior to November 20, 1961, certain of the terms of the lease under which the building was to be rented by Hoffman were understood between him and Lukowitz. The lease was to be for 10 years with a rental approximating $550 a month calculated on the basis of 1 percent per month on the building cost, plus 6 percent of the land cost divided on a monthly basis. At the end of the 10-year term he was to have an option to renew the lease for an additional 10-year period or to buy the property at cost on an instalment basis. There was no discussion as to what the instalments would be or with respect to repairs and maintenance.

On November 22nd or 23rd, Lukowitz and plaintiffs met in Minneapolis with Red Owl's credit manager to confer on Hoffman's financial standing and on financing the agency. Another projected financial statement was there drawn up entitled, "Proposed Financing For An Agency Store." This showed Hoffman contributing $24,100 of cash capital of which only $4,600 was to be cash possessed by plaintiffs. Eight thousand was to be procured as a loan from a Chilton bank secured by a mortgage on the bakery fixtures, $7,500 was to be obtained on a 5 percent loan from the father-in-law, and $4,000 was to be obtained by sale of the lot to the lessor at a profit.

A week or two after the Minneapolis meeting Lukowitz showed Hoffman a telegram from the home office to the effect that if plaintiff could get another $2,000 for promotional purposes the deal could go through for $26,000. Hoffman stated he would have to find out if he could get another $2,000. He met with his father-in-law, who agreed to put $13,000 into the business provided he could come into the business as a partner. Lukowitz told Hoffman the partnership arrangement "sounds fine" and that Hoffman should not go into the partnership arrangement with the "front office." On January 16, 1962, the Red Owl credit manager teletyped Lukowitz that the father-in-law would have to sign an agreement that the $13,000 was either a gift or a loan subordinate to all general creditors and that he would prepare the agreement. On January 31, 1962, Lukowitz teletyped the home office that the father-in-law would sign one or other of the agreements. However, Hoffman testified that it was not until the final meeting some time between January 26th and

February 2nd, 1962, that he was told that his father-in-law was expected to sign an agreement that the $13,000 he was advancing was to be an outright gift. No mention was then made by the Red Owl representatives of the alternative of the father-in-law signing a subordination agreement. At this meeting the Red Owl agents presented Hoffman with the following projected financial statement:

"Capital required in operation:			
"Cash		$ 5,000.00	
"Merchandise		20,000.00	
"Bakery		18,000.00	
"Fixtures		17,500.00	
"Promotional Funds		1,500.00	
	"TOTAL:		$62,000.00
"Source of funds:			
"Red Owl 7-day terms		$ 5,000.00	
"Red Owl Fixture contract (Term 5 years)		14,000.00	
"Bank loans (Term 9 years Union State Bank "of Chilton "(Secured by Bakery Equipment)		8,000.00	
"Other loans (Term No-pay) No interest "Father-in-law "(Secured by None)		13,000.00	
"(Secured by Mortgage on " Wautoma Bakery Bldg.)		2,000.00	
"Resale of land		6,000.00	
"Equity Capital:	$ 5,000.00-Cash		
"Amount owner has "to invest:	17,500.00-Bakery Equip.	22,500.00	
	"TOTAL:		$70,500.00"

Hoffman interpreted the above statement to require of plaintiffs a total of $34,000 cash made up of $13,000 gift from his father-in-law, $2,000 on mortgage, $8,000 on Chilton bank loan, $5,000 in cash from plaintiff, and $6,000 on the resale of the Chilton lot. Red Owl claims $18,000 is the total of the unborrowed or unencumbered cash, that is, $13,000 from the father-in-law and $5,000 cash from Hoffman himself. Hoffman informed Red Owl he could not go along with this proposal, and particularly objected to the requirement that his father-in-law sign an agreement that his $13,000 advancement was an absolute gift. This terminated the negotiations between the parties.

The case was submitted to the jury on a special verdict with the first two questions answered by the court. This verdict, as returned by the jury, was as follows:

"Question No. 1: Did the Red Owl Stores, Inc. and Joseph Hoffman on or about mid-May of 1961 initiate negotiations looking to the establishment of Joseph Hoffman as a franchise operator of a Red Owl Store in Chilton? Answer: Yes. (Answered by the Court.)

"Question No. 2: Did the parties mutually agree on all of the details of the proposal so as to reach a final agreement thereon? Answer: No. (Answered by the Court.)

"Question No. 3: Did the Red Owl Stores, Inc., in the course of said negotiations, make representations to Joseph Hoffman that if he fulfilled certain conditions that they would establish him as a franchise operator of a Red Owl Store in Chilton? Answer: Yes.

"Question No. 4: If you have answered Question No. 3 'Yes,' then answer this question: Did Joseph Hoffman rely on said representations and was he induced to act thereon? Answer: Yes.

"Question No. 5: If you have answered Question No. 4 'Yes,' then answer this question: Ought Joseph Hoffman, in the exercise of ordinary care, to have relied on said representations? Answer: Yes.

"Question No. 6: If you have answered Question No. 3 'Yes' then answer this question: Did Joseph Hoffman fulfill all the conditions he was required to fulfill by the terms of the negotiations between the parties up to January 26, 1962? Answer: Yes.

"Question No. 7: What sum of money will reasonably compensate the plaintiffs for such damages as they sustained by reason of:

"(a) The sale of the Wautoma store fixtures and inventory?

"Answer: $16,735.00.

"(b) The sale of the bakery building?

"Answer: $2,000.00.

"(c) Taking up the option on the Chilton lot?

"Answer: $1,000.00.

"(d) Expenses of moving his family to Neenah?

"Answer: $140.00.

"(e) House rental in Chilton?

"Answer: $125.00."

Plaintiffs moved for judgment on the verdict while defendants moved to change the answers to Questions 3, 4, 5, and 6 from "Yes" to "No", and in the alternative for relief from the answers to the subdivisions of Question 7 or a new trial. On March 31, 1964, the circuit court entered the following order:

"IT IS ORDERED in accordance with said decision on motions after verdict hereby incorporated herein by reference:

"1. That the answer of the jury to Question No. 7 (a) be and the same is hereby vacated and set aside and that a new trial be had on the sole issue of the damages for loss, if any, on the sale of the Wautoma store, fixtures and inventory.

"2. That all other portions of the verdict of the jury be and hereby are approved and confirmed and all after-verdict motions of the parties inconsistent with this order are hereby denied."

Defendants have appealed from this order and plaintiffs have cross-appealed from paragraph 1. thereof.

Benton, Bosser, Fulton, Menn & Nehs, Appleton, for appellants.

Van Hoof, Van Hoof & Wylie, Little Chute, for respondents.

CURRIE, Chief Justice.

The instant appeal and cross-appeal present these questions:

(1) Whether this court should recognize causes of action grounded on promissory

estoppel as exemplified by sec. 90 of Restatement, 1 Contracts?

(2) Do the facts in this case make out a cause of action for promissory estoppel?

(3) Are the jury's findings with respect to damages sustained by the evidence?

Recognition of a Cause of Action Grounded on Promissory Estoppel.

Sec. 90 of Restatement, 1 Contracts, provides (at p. 110):

> "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."

The Wisconsin Annotations to Restatement, Contracts, prepared under the direction of the late Professor William H. Page and issued in 1933, stated (at p. 53, sec. 90):

> "The Wisconsin cases do not seem to be in accord with this section of the Restatement. It is certain that no such proposition has ever been announced by the Wisconsin court and it is at least doubtful if it would be approved by the court."

Since 1933, the closest approach this court has made to adopting the rule of the Restatement occurred in the recent case of Lazarus v. American Motors Corp. (1963), 21 Wis.2d 76, 85, 123 N.W.2d 548, 553, wherein the court stated:

> "We recognize that upon different facts it would be possible for a seller of steel to have altered his position so as to effectuate the equitable considerations inherent in sec. 90 of the Restatement."

[1] While it was not necessary to the disposition of the Lazarus Case to adopt the promissory estoppel rule of the Restatement, we are squarely faced in the instant case with that issue. Not only did the trial court frame the special verdict on the theory of sec. 90 of Restatement, 1 Contracts, but no other possible theory has been presented to or discovered by this court which would permit plaintiffs to recover. Of other remedies considered that of an action for fraud and deceit seemed to be the most comparable. An action at law for fraud, however, cannot be predicated on unfulfilled promises unless the promisor possessed the present intent not to perform. Suskey v. Davidoff (1958), 2 Wis.2d 503, 507, 87 N.W.2d 306, and cases cited. Here, there is no evidence that would support a finding that Lukowitz made any of the promises, upon which plaintiffs' complaint is predicated, in bad faith with any present intent that they would not be fulfilled by Red Owl.

Many courts of other jurisdictions have seen fit over the years to adopt the principle of promissory estoppel, and the tendency in that direction continues.[1] As Mr. Justice McFADDIN, speaking in behalf of the Arkansas court, well stated, that the development of the law of promissory estoppel "is an attempt by the courts to keep remedies abreast of increased moral consciousness of honesty and fair representations in all business dealings." Peoples National Bank of Little Rock v.

1. Among the many cases which have granted relief grounded upon promissory estoppel are: Goodman v. Dicker (1948), 83 U.S.App.D.C. 353, 169 F.2d 684; Drennan v. Star Paving Company (1958), 51 Cal.2d 409, 333 P.2d 757; Van Hook v. Southern California Waiters Alliance (1958), 158 Cal.App.2d 556, 323 P.2d 212; Chrysler Corporation v. Quimby (1958), 1 Storey 264, 51 Del. 264, 144 A.2d 123, 144 A.2d 885; Lusk-Harbison-Jones, Inc. v. Universal Credit Co. (1933), 164 Miss. 603, 145 So. 623; Feinberg v. Pfeiffer Company (Mo.App.1959), 322 S.W.2d 163; Schafer v. Fraser (1955), 206 Or. 440, 290 P.2d 190, 294 P.2d 609; Northwestern Engineering Co. v. Ellerman (1943), 69 S.D. 397, 10 N.W.2d 879.

Linebarger Construction Company (1951), 219 Ark. 11, 17, 240 S.W.2d 12, 16. For a further discussion of the doctrine of promissory estoppel, see 1A Corbin, Contracts, pp. 187, et seq., secs. 193–209; 3 Pomeroy's Equity Jurisprudence (5th ed.), pp. 211, et seq., sec. 808b; 1 Williston, Contracts (Jaeger's 3d ed.), pp. 607, et seq., sec. 140; Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine 98 University of Pennsylvania Law Review (1950), 459; Seavey Reliance Upon Gratuitous Promises or Other Conduct, 64 Harvard Law Review (1951), 913; Annos. 115 A.L.R. 152, and 48 A.L.R.2d 1069.

The Restatement avoids use of the term "promissory estoppel," and there has been criticism of it as an inaccurate term. See 1A Corbin, Contracts, p. 232, et seq., sec. 204. On the other hand, Williston advocated the use of this term or something equivalent. 1 Williston, Contracts (1st ed.), p. 308, sec. 139. Use of the word "estoppel" to describe a doctrine upon which a party to a lawsuit may obtain affirmative relief offends the traditional concept that estoppel merely serves as a shield and cannot serve as a sword to create a cause of action. See Utschig v. McClone (1962), 16 Wis.2d 506, 509, 114 N.W.2d 854. "Attractive nuisance" is also a much criticized term. See concurring opinion, Flamingo v. City of Waukesha (1952), 262 Wis. 219, 227, 55 N.W.2d 24. However, the latter term is still in almost universal use by the courts because of the lack of a better substitute. The same is also true of the wide use of the term "promissory estoppel." We have employed its use in this opinion not only because of its extensive use by other courts but also since a more accurate equivalent has not been devised.

[2] Because we deem the doctrine of promissory estoppel, as stated in sec. 90 of Restatement, 1 Contracts, is one which supplies a needed tool which courts may employ in a proper case to prevent injustice, we endorse and adopt it.

Applicability of Doctrine to Facts of this Case.

The record here discloses a number of promises and assurances given to Hoffman by Lukowitz in behalf of Red Owl upon which plaintiffs relied and acted upon to their detriment.

Foremost were the promises that for the sum of $18,000 Red Owl would establish Hoffman in a store. After Hoffman had sold his grocery store and paid the $1,000 on the Chilton lot, the $18,000 figure was changed to $24,100. Then in November, 1961, Hoffman was assured that if the $24,100 figure were increased by $2,000 the deal would go through. Hoffman was induced to sell his grocery store fixtures and inventory in June, 1961, on the promise that he would be in his new store by fall. In November, plaintiffs sold their bakery building on the urging of defendants and on the assurance that this was the last step necessary to have the deal with Red Owl go through.

[3] We determine that there was ample evidence to sustain the answers of the jury to the questions of the verdict with respect to the promissory representations made by Red Owl, Hoffman's reliance thereon in the exercise of ordinary care, and his fulfillment of the conditions required of him by the terms of the negotiations had with Red Owl.

There remains for consideration the question of law raised by defendants that agreement was never reached on essential factors necessary to establish a contract between Hoffman and Red Owl. Among these were the size, cost, design, and layout of the store building; and the terms of the lease with respect to rent, maintenance, renewal, and purchase options. This poses the question of whether the promise necessary to sustain a cause of action for promissory estoppel must embrace all essential details of a proposed transaction between promisor and promisee so as to be the equivalent of an offer that would

result in a binding contract between the parties if the promisee were to accept the same.

[4, 5] Originally the doctrine of promissory estoppel was invoked as a substitute for consideration rendering a gratuitous promise enforceable as a contract. See Williston, Contracts (1st ed.), p. 307, sec. 139. In other words, the acts of reliance by the promisee to his detriment provided a substitute for consideration. If promissory estoppel were to be limited to only those situations where the promise giving rise to the cause of action must be so definite with respect to all details that a contract would result were the promise supported by consideration, then the defendants' instant promises to Hoffman would not meet this test. However, sec. 90 of Restatement, 1 Contracts, does not impose the requirement that the promise giving rise to the cause of action must be so comprehensive in scope as to meet the requirements of an offer that would ripen into a contract if accepted by the promisee. Rather the conditions imposed are:

(1) Was the promise one which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee?

(2) Did the promise induce such action or forbearance?

(3) Can injustice be avoided only by enforcement of the promise? [2]

We deem it would be a mistake to regard an action grounded on promissory estoppel as the equivalent of a breach of contract action. As Dean Boyer points out, it is desirable that fluidity in the application of the concept be maintained. 98 University of Pennsylvania Law Review (1950), 459, at page 497. While the first two of the above listed three requirements of promissory estoppel present issues of fact which ordinarily will be resolved by a jury, the third requirement, that the remedy can only be invoked where necessary to avoid injustice, is one that involves a policy decision by the court. Such a policy decision necessarily embraces an element of discretion.

[6] We conclude that injustice would result here if plaintiffs were not granted some relief because of the failure of defendants to keep their promises which induced plaintiffs to act to their detriment.

Damages.

Defendants attack all the items of damages awarded by the jury.

[7, 8] The bakery building at Wautoma was sold at defendants' instigation in order that Hoffman might have the net proceeds available as part of the cash capital he was to invest in the Chilton store venture. The evidence clearly establishes that it was sold at a loss of $2,000. Defendants contend that half of this loss was sustained by Mrs. Hoffman because title stood in joint tenancy. They point out that no dealings took place between her and defendants as all negotiations were had with her husband. Ordinarily only the promisee and not third persons are entitled to enforce the remedy of promissory estoppel against the promisor. However, if the promisor actually foresees, or has reason to foresee, action by a third person in reliance on the promise, it may be quite unjust to refuse to perform the promise. 1A Corbin, Contracts, p. 220, sec. 200. Here not only did defendants foresee that it would be necessary for Mrs. Hoffman to sell her joint interest in the bakery building, but defendants actually requested that this be done. We approve the jury's award of $2,000 damages for the loss incurred by both plaintiffs in this sale.

[9, 10] Defendants attack on two grounds the $1,000 awarded because of Hoff-

2. See Boyer, 98 University of Pennsylvania Law Review (1950), 459, 460. "Enforcement" of the promise embraces an award of damages for breach as well as decreeing specific performance.

man's payment of that amount on the purchase price of the Chilton lot. The first is that this $1,000 had already been lost at the time the final negotiations with Red Owl fell through in January, 1962, because the remaining $5,000 of purchase price had been due on October 15, 1961. The record does not disclose that the lot owner had foreclosed Hoffman's interest in the lot for failure to pay this $5,000. The $1,000 was not paid for the option, but had been paid as part of the purchase price at the time Hoffman elected to exercise the option. This gave him an equity in the lot which could not be legally foreclosed without affording Hoffman an opportunity to pay the balance. The second ground of attack is that the lot may have had a fair market value of $6,000, and Hoffman should have paid the remaining $5,000 of purchase price. We determine that it would be unreasonable to require Hoffman to have invested an additional $5,000 in order to protect the $1,000 he had paid. Therefore, we find no merit to defendants' attack upon this item of damages.

[11] We also determine it was reasonable for Hoffman to have paid $125 for one month's rent of a home in Chilton after defendants assured him everything would be set when plaintiff sold the bakery building. This was a proper item of damage.

[12] Plaintiffs never moved to Chilton because defendants suggested that Hoffman get some experience by working in a Red Owl store in the Fox River Valley. Plaintiffs, therefore, moved to Neenah instead of Chilton. After moving, Hoffman worked at night in an Appleton bakery but held himself available for work in a Red Owl store. The $140 moving expense would not have been incurred if plaintiffs had not sold their bakery building in Wautoma in reliance upon defendants' promises. We consider the $140 moving expense to be a proper item of damage.

We turn now to the damage item with respect to which the trial court granted a new trial, i. e., that arising from the sale of the Wautoma grocery store fixtures and inventory for which the jury awarded $16,735. The trial court ruled that Hoffman could not recover for any loss of future profits for the summer months following the sale on June 6, 1961, but that damages would be limited to the difference between the sales price received and the fair market value of the assets sold, giving consideration to any goodwill attaching thereto by reason of the transfer of a going business. There was no direct evidence presented as to what this fair market value was on June 6, 1961. The evidence did disclose that Hoffman paid $9,000 for the inventory, added $1,500 to it and sold it for $10,000 or a loss of $500. His 1961 federal income tax return showed that the grocery equipment had been purchased for $7,000 and sold for $7,955.96. Plaintiffs introduced evidence of the buyer that during the first eleven weeks of operation of the grocery store his gross sales were $44,000 and his profit was $6,000 or roughly 15 percent. On cross-examination he admitted that this was gross and not net profit. Plaintiffs contend that in a breach of contract action damages may include loss of profits. However, this is not a breach of contract action.

The only relevancy of evidence relating to profits would be with respect to proving the element of goodwill in establishing the fair market value of the grocery inventory and fixtures sold. Therefore, evidence of profits would be admissible to afford a foundation for expert opinion as to fair market value.

[13] Where damages are awarded in promissory estoppel instead of specifically enforcing the promisor's promise, they should be only such as in the opinion of the court are necessary to prevent injustice. Mechanical or rule of thumb approaches to the damage problem should be avoided. In discussing remedies to be applied by courts in promissory estoppel we quote the following views of writers on the subject:

"Enforcement of a promise does not necessarily mean Specific Performance.

It does not necessarily mean Damages for breach. Moreover the amount allowed as Damages may be determined by the plaintiff's expenditures or change of position in reliance as well as by the value to him of the promised performance. Restitution is also an 'enforcing' remedy, although it is often said to be based upon some kind of a rescission. In determining what justice requires, the court must remember all of its powers, derived from equity, law merchant, and other sources, as well as the common law. Its decree should be molded accordingly." 1A Corbin, Contracts, p. 221, sec. 200.

"The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment. It would follow that the damages should not exceed the loss caused by the change of position, which would never be more in amount, but might be less, than the promised reward." Seavey, Reliance on Gratuitous Promises or Other Conduct, 64 Harvard Law Review (1951), 913, 926.

"There likewise seems to be no positive legal requirement, and certainly no legal policy, which dictates the allowance of contract damages in every case where the defendant's duty is consensual." Shattuck, Gratuitous Promises—A New Writ?, 35 Michigan Law Review (1936), 908, 912.[3]

[14] At the time Hoffman bought the equipment and inventory of the small grocery store at Wautoma he did so in order to gain experience in the grocery store business. At that time discussion had already been had with Red Owl representatives that Wautoma might be too small for a Red Owl operation and that a larger city might be more desirable. Thus Hoffman made this purchase more or less as a temporary experiment. Justice does not require that the damages awarded him, because of selling these assets at the behest of defendants, should exceed any actual loss sustained measured by the difference between the sales price and the fair market value.

[15] Since the evidence does not sustain the large award of damages arising from the sale of the Wautoma grocery business, the trial court properly ordered a new trial on this issue.

Order affirmed. Because of the cross-appeal, plaintiffs shall be limited to taxing but two-thirds of their costs.

3. For expression of the opposite view, that courts in promissory estoppel cases should treat them as ordinary breach of contract cases and allow the full amount of damages recoverable in the latter, see note, 13 Vanderbilt Law Review (1960), 705.

27 Wis.2d 1

Raymond PLATKE, Respondent,

v.

JOHN HANCOCK MUTUAL LIFE INSURANCE CO., a foreign corporation, Appellant.

Supreme Court of Wisconsin.

March 2, 1965.

Rehearing Denied April 27, 1965.

Action to recover on life policy. The Circuit Court, Milwaukee County, Harvey L. Neelen, J., entered judgment for plaintiff and defendants appealed. The Supreme Court, Gordon, J., held that insurer's medical report requiring its doctor to evaluate general appearance and apparent age of applicant for life policy and to state whether he found evidence of past or present disease and whether in his opinion there was anything detrimental in habits, surroundings or occupation of applicant constituted an opinion as to applicant's fitness for

GIANNI v. R. RUSSEL & CO., Inc.

(Supreme Court of Pennsylvania. Nov. 24, 1924.)

1. Evidence ⟸397(2)—Writing, to exclude parol evidence, must be entire contract.

Writing, to exclude parol evidence, must be entire contract.

2. Evidence ⟸397(2)—Writing, appearing complete within itself, conclusively presumed to contain whole engagement of parties.

If written contract appears complete within itself, without uncertainty, it is conclusively presumed that whole engagement of parties was reduced to writing.

3. Evidence ⟸441(1)—Method of determining whether oral agreement comes within terms of written agreement stated.

If oral and written agreement relate to same subject-matter, and are so interrelated that both would be executed at same time, and in same contract, scope of oral subsidiary agreement must be taken to be covered by writing.

4. Evidence ⟸441(1)—Whether oral contract is covered by written contract, question for court.

Whether oral agreement comes within field covered by written agreement is question for court.

5. Evidence ⟸397(2)—Writing assumed to set forth entire agreement as to subjects dealt with therein.

Where cause of action rests entirely on alleged oral understanding concerning subject dealt with in written contract, it is assumed that writing sets forth entire agreement as to that subject.

6. Evidence ⟸441(4)—Evidence of oral contract relating to subject-matter included in written contract not admissible.

Where written lease for use of premises for sale of soft drinks and candy was complete contract, and provided that lessee could not sell tobacco in any form, parol evidence that consideration for such restriction was exclusive privilege to sell soft drinks was not admissible in action by lessee for breach of oral contract.

7. Evidence ⟸428—Oral evidence to vary written contract must be of fraud, accident, or mistake sufficient to reform instrument.

Oral evidence varying written contract, to be admissible, must be of fraud, accident, or mistake sufficient to secure reformation of instrument.

Appeal from Court of Common Pleas, Allegheny County; James R. Macfarlane, Judge.

Action by Frank Gianni against R. Russel & Co., Inc. From judgment for plaintiff, defendant appeals. Reversed, and judgment entered for defendant.

Argued before MOSCHZISKER, C. J., and FRAZER, WALLING, SIMPSON, KEPHART, SADLER, and SCHAFFER, JJ.

L. S. Levin, of Pittsburgh, for appellant.
R. B. Ivory, of Pittsburgh, for appellee.

SCHAFFER, J. Plaintiff had been a tenant of a room in an office building in Pittsburgh wherein he conducted a store, selling tobacco, fruit, candy and soft drinks. Defendant acquired the entire property in which the storeroom was located, and its agent negotiated with plaintiff for a further leasing of the room. A lease for three years was signed. It contained a provision that the lessee should "use the premises only for the sale of fruit, candy, soda water," etc., with the further stipulation that "it is expressly understood that the tenant is not allowed to sell tobacco in any form, under penalty of instant forfeiture of this lease." The document was prepared following a discussion about renting the room between the parties and after an agreement to lease had been reached. It was signed after it had been left in plaintiff's hands and admittedly had been read over to him by two persons, one of whom was his daughter.

Plaintiff sets up that in the course of his dealings with defendant's agent it was agreed that, in consideration of his promises not to sell tobacco and to pay an increased rent, and for entering into the agreement as a whole, he should have the exclusive right to sell soft drinks in the building. No such stipulation is contained in the written lease. Shortly after it was signed defendant demised the adjoining room in the building to a drug company without restricting the latter's right to sell soda water and soft drinks. Alleging that this was in violation of the contract which defendant had made with him, and that the sale of these beverages by the drug company had greatly reduced his receipts and profits, plaintiff brought this action for damages for breach of the alleged oral contract, and was permitted to recover. Defendant has appealed.

Plaintiff's evidence was to the effect that the oral agreement had been made at least two days, possibly longer, before the signing of the instrument, and that it was repeated at the time he signed; that, relying upon it, he executed the lease. Plaintiff called one witness who said he heard defendant's agent say to plaintiff at a time admittedly several days before the execution of the lease that he would have the exclusive right to sell soda water and soft drinks, to which the latter replied if that was the case he accepted the tenancy. Plaintiff produced no witness who was present when the contract was executed to corroborate his statement as to what then occurred. Defendant's agent denied that any such agreement was made, either preliminary to or at the time of the execution of the lease.

Appellee's counsel argues this is not a case in which an endeavor is being made to re-

form a written instrument because of something omitted as a result of fraud, accident, or mistake, but is one involving the breach of an independent oral agreement which does not belong in the writing at all and is not germane to its provisions. We are unable to reach this conclusion.

"Where parties, without any fraud or mistake, have deliberately put their engagements in writing, the law declares the writing to be not only the best, but the only, evidence of their agreement." Martin v. Berens, 67 Pa. 459, 463; Irvin v. Irvin, 142 Pa. 271, 287, 21 A. 816

"All preliminary negotiations, conversations and verbal agreements are merged in and superseded by the subsequent written contract, * * * and 'unless fraud, accident, or mistake be averred, the writing constitutes the agreement between the parties, and its terms cannot be added to nor substracted from by parol evidence.'" Union Storage Co. v Speck, 194 Pa. 126, 133, 45 A. 48, 49; Vito v. Birkel, 209 Pa. 206, 208, 58 A. 127.

[1, 2] The writing must be the entire contract between the parties if parol evidence is to be excluded, and to determine whether it is or not the writing will be looked at, and if it appears to be a contract complete within itself, "couched in such terms as import a complete legal obligation without any uncertainty as to the object or extent of the engagement, it is conclusively presumed that the whole engagement of the parties, and the extent and manner of their undertaking, were reduced to writing." Seitz v. Brewers' Refrigerating Machine Co., 141 U. S. 510, 517, 12 S. Ct. 46, 48 (35 L. Ed. 837).

[3, 4] When does the oral agreement come within the field embraced by the written one? This can be answered by comparing the two, and determining whether parties, situated as were the ones to the contract, would naturally and normally include the one in the other if it were made. If they relate to the same subject-matter, and are so interrelated that both would be executed at the same time and in the same contract, the scope of the subsidiary agreement must be taken to be covered by the writing. This question must be determined by the court.

In the case at bar the written contract stipulated for the very sort of thing which plaintiff claims has no place in it. It covers the use to which the storeroom was to be put by plaintiff and what he was and what he was not to sell therein. He was "to use the premises only for the sale of fruit, candy, soda water," etc., and was not "allowed to sell tobacco in any form." Plaintiff claims his agreement not to sell tobacco was part of the consideration for the exclusive right to sell soft drinks. Since his promise to refrain was included in the writing, it would be the natural thing to have included the promise of exclusive rights. Nothing can be imagined more pertinent to these provisions which were included than the one appellee avers.

[5] In cases of this kind, where the cause of action rests entirely on an alleged oral understanding concerning a subject which is dealt with in a written contract it is presumed that the writing was intended to set forth the entire agreement as to that particular subject.

"In deciding upon this intent [as to whether a certain subject was intended to be embodied by the writing], the chief and most satisfactory index * * * is found in the circumstance whether or not the particular element of the alleged extrinsic negotiation is dealt with at all in the writing. If it is mentioned, covered, or dealt with in the writing, then presumably the writing was meant to represent all of the transaction on that element; if it is not, then probably the writing was not intended to embody that element of the negotiation." Wigmore on Evidence (2d Ed.) vol. 5, p. 309.

[6] As the written lease is the complete contract of the parties, and since it embraces the field of the alleged oral contract, evidence of the latter is inadmissible under the parol evidence rule.

"The [parol evidence] rule also denies validity to a subsidiary agreement within [the] scope [of the written contract] if sued on as a separate contract, although except for [that rule], the agreement fulfills all the requisites of valid contract." 2 Williston, Contracts, 1222; Penn Iron Co. v. Diller, 1 Sad. 82, 1 A. 924; Krueger v. Nicola, 205 Pa. 38, 54 A. 494; Wodock v. Robinson, 148 Pa. 503, 24 A. 73.

[7] There are, of course, certain exceptions to the parol evidence rule, but this case does not fall within any of them. Plaintiff expressly rejects any idea of fraud, accident, or mistake, and they are the foundation upon which any basis for admitting parol evidence to set up an entirely separate agreement within the scope of a written contract must be built. The evidence must be such as would cause a chancellor to reform the instrument, and that would be done only for these reasons (Ploso v. Bitzer, 209 Pa. 503, 58 A. 891) and this holds true where this essentially equitable relief is being given, in our Pennsylvania fashion, through common-law forms.

We have stated on several occasions recently that we propose to stand for the integrity of written contracts. Wolverine Glass Co. v. Miller, 279 Pa. 138, 146, 123 A. 672; Evans v. Edelstein, 276 Pa. 516, 120 A. 473; Neville v. Kretzschmar, 271 Pa. 222, 114 A. 625. We reiterate our position in this regard.

The judgment of the court below is reversed, and is here entered for defendant.

(247 N. Y. 377)

MITCHILL v. LATH et al.

Court of Appeals of New York. Feb. 14, 1928.

1. Evidence ⇐397(1)—Parol evidence rule defines limits of written contract, which cannot be controlled by oral testimony, unless admitted without objection.

Parol evidence rule defines limits of contract to be construed, and oral testimony, even if admitted, will not control the written contract, unless admitted without objection.

2. Evidence ⇐397(1), 441(1)—Parol evidence rule precludes oral evidence modifying written contract, though it does not affect independent collateral agreement.

Parol evidence rule applies to attempts to modify written contract by parol, but does not apply to parol collateral contract distinct from and independent of the written contract.

3. Evidence ⇐441(1)—Substance of transaction and policy of local courts are considered in determining whether oral evidence modifies written contract or involves independent collateral agreement.

In determining whether parol evidence involves distinct collateral agreement or modifies written contract, rendering it inadmissible, substance and not the form of the transaction is considered, together with policy followed by courts of the state.

4. Evidence ⇐441(1)—Oral agreement is inadmissible to vary written contract, unless it is collateral in form, does not contradict written contract, and is such that parties would not ordinarily be expected to embody it in the writing.

Proof of oral agreement to vary written contract is inadmissible, unless agreement is collateral in form and does not contradict express or implied provisions of the written contract, and it must not be so closely related to written agreement that parties would ordinarily be expected to embody it in the writing; in other words, oral agreement must not be clearly connected with the principal transaction as to be part and parcel of it.

5. Evidence ⇐441(8)—Proof of vendor's oral agreement to remove icehouse held inadmissible as varying terms of written contract for sale of farm.

Proof of oral agreement of vendor of farm to remove icehouse, in consideration for purchase of premises, held inadmissible under parol evidence rule, as varying terms of written purchase contract in which vendors agreed to give deed to farm, selling personal property, to assume risk of loss prior to delivery of deed, and to pay broker's commissions, since oral agreement was so closely related to the subject-matter of the written agreement as to prevent proof of it as a collateral contract.

6. Evidence ⇐441(8)—Wife to whom deed of farm was given held principal, in determining admissibility of alleged collateral agreement with wife, notwithstanding written contract was with husband.

Though contract for sale of farm was entered into with husband as purchaser, and no assignment from him appeared, wife to whom deed was given was treated as principal in determining whether proof of vendor's alleged collateral agreement with her to remove icehouse was admissible under parol evidence rule.

Lehman and Crane, JJ., dissenting.

Appeal from Supreme Court, Appellate Division, Second Department.

Action by Catherine C. Mitchill against Charles Lath and another. Judgment of Special Term in plaintiff's favor, directing specific performance of an agreement to remove an icehouse, was affirmed by the Appellate Division (220 App. Div. 776, 221 N. Y. S. 864), and defendants appeal. Judgments of Appellate Division and Trial Term reversed, and complaint dismissed.

James G. Meyer, John T. Kelly, and Daniel A. Dugan, all of Beacon, for appellants.

Arthur H. Haaren, of New York City, for respondent.

ANDREWS, J. In the fall of 1923 the Laths owned a farm. This they wished to sell. Across the road, on land belonging to Lieutenant Governor Lunn, they had an icehouse which they might remove. Mrs. Mitchill looked over the land with a view to its purchase. She found the icehouse objectionable. Thereupon "the defendants orally promised and agreed, for and in consideration of the purchase of their farm by the plaintiff, to remove the said icehouse in the spring of 1924." Relying upon this promise, she made a written contract to buy the property for $8,400, for cash and a mortgage and containing various provisions usual in such papers. Later receiving a deed, she entered into possession, and has spent considerable sums in improving the property for use as a summer residence. The defendants have not fulfilled their promise as to the icehouse, and do not intend to do so. We are not dealing, however, with their moral delinquencies. The question before us is whether their oral agreement may be enforced in a court of equity.

[1, 2] This requires a discussion of the parol evidence rule—a rule of law which defines the limits of the contract to be construed. Glackin v. Bennett, 226 Mass. 310, 115 N. E. 490. It is more than a rule of evidence, and oral testimony, even if admitted, will not control the written contract (O'Malley v. Grady, 222 Mass. 202, 109 N. E. 820), unless admitted without objection (Brady v. Nally,

151 N. Y. 258, 45 N. E. 547). It applies, however, to attempts to modify such a contract by parol. It does not affect a parol collateral contract distinct from and independent of the written agreement. It is, at times, troublesome to draw the line. Williston, in his work on Contracts (section 637) points out the difficulty. "Two entirely distinct contracts," he says, "each for a separate consideration, may be made at the same time, and will be distinct legally. Where, however, one agreement is entered into wholly or partly in consideration of the simultaneous agreement to enter into another, the transactions are necessarily bound together. * * * Then if one of the agreements is oral and the other in writing, the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement." That is the situation here. It is claimed that the defendants are called upon to do more than is required by their written contract in connection with the sale as to which it deals.

[3] The principle may be clear, but it can be given effect by no mechanical rule. As so often happens, it is a matter of degree, for, as Prof. Williston also says, where a contract contains several promises on each side it is not difficult to put any one of them in the form of a collateral agreement. If this were enough, written contracts might always be modified by parol. Not form, but substance, is the test.

In applying this test, the policy of our courts is to be considered. We have believed that the purpose behind the rule was a wise one, not easily to be abandoned. Notwithstanding injustice here and there, on the whole it works for good. Old precedents and principles are not to be lightly cast aside, unless it is certain that they are an obstruction under present conditions. New York has been less open to arguments that would modify this particular rule, than some jurisdictions elsewhere. Thus in Eighmie v. Taylor, 98 N. Y. 288, it was held that a parol warranty might not be shown, although no warranties were contained in the writing.

[4] Under our decisions before such an oral agreement as the present is received to vary the written contract, at least three conditions must exist: (1) The agreement must in form be a collateral one; (2) it must not contradict express or implied provisions of the written contract; (3) it must be one that parties would not ordinarily be expected to embody in the writing, or, put in another way, an inspection of the written contract, read in the light of surrounding circumstances, must not indicate that the writing appears "to contain the engagements of the parties, and to define the object and measure the extent of such engagement." Or, again, it must not be so clearly connected with the principal transaction as to be part and parcel of it.

[5] The respondent does not satisfy the third of these requirements. It may be, not the second. We have a written contract for the purchase and sale of land. The buyer is to pay $8,400 in the way described. She is also to pay her portion of any rents, interest on mortgages, insurance premiums, and water meter charges. She may have a survey made of the premises. On their part, the sellers are to give a full covenant deed of the premises as described, or as they may be described by the surveyor, if the survey is had, executed, and acknowledged at their own expense; they sell the personal property on the farm and represent they own it; they agree that all amounts paid them on the contract and the expense of examining the title shall be a lien on the property; they assume the risk of loss or damage by fire until the deed is delivered; and they agree to pay the broker his commissions. Are they to do more? Or is such a claim inconsistent with these precise provisions? It could not be shown that the plaintiff was to pay $500 additional. Is it also implied that the defendants are not to do anything unexpressed in the writing?

That we need not decide. At least, however, an inspection of this contract shows a full and complete agreement, setting forth in detail the obligations of each party. On reading it, one would conclude that the reciprocal obligations of the parties were fully detailed. Nor would his opinion alter if he knew the surrounding circumstances. The presence of the icehouse, even the knowledge that Mrs. Mitchill thought it objectionable, would not lead to the belief that a separate agreement existed with regard to it. Were such an agreement made it would seem most natural that the inquirer should find it in the contract. Collateral in form it is found to be, but it is closely related to the subject dealt with in the written agreement—so closely that we hold it may not be proved.

Where the line between the competent and the incompetent is narrow the citation of authorities is of slight use. Each represents the judgment of the court on the precise facts before it. How closely bound to the contract is the supposed collateral agreement is the decisive factor in each case. But reference may be made to Johnson v. Oppenheim, 55 N. Y. 280, 292; Thomas v. Scutt, 127 N. Y. 133, 27 N. E. 961; Eighmie v. Taylor, 98 N. Y. 288; Stowell v. Greenwich Ins. Co., 163 N. Y. 298, 57 N. E. 480; Newburger v. American Surety Co., 242 N. Y. 134, 151 N. E. 155; Love v. Hamel, 59 App. Div. 360, 69 N. Y. S. 251; Daly v. Piza, 105 App. Div. 496, 94 N. Y. S.

154; Seitz v. Brewer's Refrigerating Co., 141 U. S. 510, 12 S. Ct. 46, 35 L. Ed. 837; American Locomotive Co. v. National Wholesale Grocery Co., Inc., 226 Mass. 314, 115 N. E. 404, L. R. A. 1917D, 1125; Doyle v. Dixon, 12 Allen (Mass.) 576. Of these citations, Johnson v. Oppenheim and the two in the Appellate Division relate to collateral contracts said to have been the inducing cause of the main contract. They refer to leases. A similar case is Wilson v. Deen, 74 N. Y. 531. All hold that an oral stipulation, said to have been the inducing cause for the subsequent execution of the lease itself, concerning some act to be done by the landlord, or some condition as to the leased premises, might not be shown. In principle they are not unlike the case before us. Attention should be called also to Taylor v. Hopper, 62 N. Y. 649, where it is assumed that evidence of a parol agreement to remove a barn, which was an inducement to the sale of lots, was improper.

We do not ignore the fact that authorities may be found that would seem to support the contention of the appellant. Such are Erskine v. Adeane (1873) L. R. 8 Ch. App. 756, and Morgan v. Griffith (1871) L. R. 6 Exch. 70, where, although there was a written lease a collateral agreement of the landlord to reduce the game was admitted. In this state, Wilson v. Deen might lead to the contrary result. Neither are they approved in New Jersey. Naumberg v. Young, 44 N. J. Law, 331, 43 Am. Rep. 380. Nor in view of later cases in this court can Batterman v. Pierce, 3 Hill, 171, be considered an authority. A line of cases in Massachusetts, of which Durkin v. Cobleigh, 156 Mass. 108, 30 N. E. 474, 17 L. R. A. 270, 32 Am. St. Rep. 436, is an example, have to do with collateral contracts made before a deed is given. But the fixed form of a deed makes it inappropriate to insert collateral agreements, however closely connected with the sale. This may be cause for an exception. Here we deal with the contract on the basis of which the deed to Mrs. Mitchill was given subsequently, and we confine ourselves to the question whether its terms may be modified.

Finally there is the case of Chapin v. Dobson, 78 N. Y. 74, 76, 34 Am. Rep. 512. This is acknowledged to be on the border line and is rarely cited except to be distinguished. Assuming the premises, however, the court was clearly right. There was nothing on the face of the written contract, it said, to show that it intended to express the entire agreement. And there was a finding, sustained by evidence, that there was an entire contract, only part of which was reduced to writing. This being so, the contract as made might be proved.

[6] It is argued that what we have said is not applicable to the case as presented. The collateral agreement was made with the plaintiff. The contract of sale was with her husband, and no assignment of it from him appears. Yet the deed was given to her. It is evident that here was a transaction in which she was the principal from beginning to end. We must treat the contract as if in form, as it was in fact, made by her.

Our conclusion is that the judgment of the Appellate Division and that of the Special Term should be reversed and the complaint dismissed, with costs in all courts.

LEHMAN, J. (dissenting). I accept the general rule as formulated by Judge ANDREWS. I differ with him only as to its application to the facts shown in the record. The plaintiff contracted to purchase land from the defendants for an agreed price. A formal written agreement was made between the sellers and the plaintiff's husband. It is on its face a complete contract for the conveyance of the land. It describes the property to be conveyed. It sets forth the purchase price to be paid. All the conditions and terms of the conveyance to be made are clearly stated. I concede at the outset that parol evidence to show additional conditions and terms of the conveyance would be inadmissible. There is a conclusive presumption that the parties intended to integrate in that written contract every agreement relating to the nature or extent of the property to be conveyed, the contents of the deed to be delivered, the consideration to be paid as a condition precedent to the delivery of the deeds, and indeed all the rights of the parties in connection with the land. The conveyance of that land was the subject-matter of the written contract, and the contract completely covers that subject.

The parol agreement which the court below found the parties had made was collateral to, yet connected with, the agreement of purchase and sale. It has been found that the defendants induced the plaintiff to agree to purchase the land by a promise to remove an icehouse from land not covered by the agreement of purchase and sale. No independent consideration passed to the defendants for the parol promise. To that extent the written contract and the alleged oral contract are bound together. The same bond usually exists wherever attempt is made to prove a parol agreement which is collateral to a written agreement. Hence "the problem arises whether the bond is sufficiently close to prevent proof of the oral agreement." See Judge ANDREWS' citation from Williston on Contracts, § 637.

Judge ANDREWS has formulated a standard to measure the closeness of the bond.

Three conditions, at least, must exist before an oral agreement may be proven to increase the obligation imposed by the written agreement. I think we agree that the first condition that the agreement "must in form be a collateral one" is met by the evidence. I concede that this condition is met in most cases where the courts have nevertheless excluded evidence of the collateral oral agreement. The difficulty here, as in most cases, arises in connection with the two other conditions.

The second condition is that the "parol agreement must not contradict express or implied provisions of the written contract." Judge ANDREWS voices doubt whether this condition is satisfied. The written contract has been carried out. The purchase price has been paid; conveyance has been made; title has passed in accordance with the terms of the written contract. The mutual obligations expressed in the written contract are left unchanged by the alleged oral contract. When performance was required of the written contract, the obligations of the parties were measured solely by its terms. By the oral agreement the plaintiff seeks to hold the defendants to other obligations to be performed by them thereafter upon land which was not conveyed to the plaintiff. The assertion of such further obligation is not inconsistent with the written contract, unless the written contract contains a provision, express or implied, that the defendants are not to do anything not expressed in the writing. Concededly there is no such express provision in the contract, and such a provision may be implied, if at all, only if the asserted additional obligation is "so clearly connected with the principal transaction as to be part and parcel of it," and is not "one that the parties would not ordinarily be expected to embody in the writing." The hypothesis so formulated for a conclusion that the asserted additional obligation is inconsistent with an implied term of the contract is that the alleged oral agreement does not comply with the third condition as formulated by Judge ANDREWS. In this case, therefore, the problem reduces itself to the one question whether or not the oral agreement meets the third condition.

I have conceded that upon inspection the contract is complete. "It appears to contain the engagements of the parties, and to define the object and measure the extent of such engagement;" it constitutes the contract between them, and is presumed to contain the whole of that contract. Eighmie v. Taylor, 98 N. Y. 288. That engagement was on the one side to convey land; on the other to pay the price. The plaintiff asserts further agreement based on the same consideration to be performed by the defendants after the conveyance was complete, and directly affecting only other land. It is true, as Judge ANDREWS points out, that "the presence of the icehouse, even the knowledge that Mrs. Mitchill thought it objectionable, would not lead to the belief that a separate agreement existed with regard to it"; but the question we must decide is whether or not, *assuming* an agreement was made for the removal of an unsightly icehouse from one parcel of land as an inducement for the purchase of another parcel, the parties would ordinarily or naturally be expected to embody the agreement for the removal of the icehouse from one parcel in the written agreement to convey the other parcel. Exclusion of proof of the oral agreement on the ground that it varies the contract embodied in the writing may be based only upon a finding or presumption that the written contract was intended to cover the oral negotiations for the removal of the icehouse which lead up to the contract of purchase and sale. To determine what the writing was intended to cover, "the document alone will not suffice. What it was intended to cover cannot be known till we know what there was to cover. The question being whether certain subjects of negotiation were intended to be covered, we must compare the writing and the negotiations before we can determine whether they were in fact covered." Wigmore on Evidence (2d Ed.) § 2430.

The subject-matter of the written contract was the conveyance of land. The contract was so complete on its face that the conclusion is inevitable that the parties intended to embody in the writing all the negotiations covering at least the conveyance. The promise by the defendants to remove the icehouse from other land was not connected with their obligation to convey except that one agreement would not have been made unless the other was also made. The plaintiff's assertion of a parol agreement by the defendants to remove the icehouse was completely established by the great weight of evidence. It must prevail unless that agreement was part of the agreement to convey and the entire agreement was embodied in the writing.

The fact that in this case the parol agreement is established by the overwhelming weight of evidence is, of course, not a factor which may be considered in determining the competency or legal effect of the evidence. Hardship in the particular case would not justify the court in disregarding or emasculating the general rule. It merely accentuates the outlines of our problem. The assumption that the parol agreement was made is no longer obscured by any doubts. The problem, then, is clearly whether the parties

are presumed to have intended to render that parol agreement legally ineffective and nonexistent by failure to embody it in the writing. Though we are driven to say that nothing in the written contract which fixed the terms and conditions of the stipulated conveyance suggests the existence of any further parol agreement, an inspection of the contract, though it is complete on its face in regard to the subject of the conveyance, does not, I think, show that it was intended to embody negotiations or agreements, if any, in regard to a matter so loosely bound to the conveyance as the removal of an icehouse from land not conveyed.

The rule of integration undoubtedly frequently prevents the assertion of fraudulent claims. Parties who take the precaution of embodying their oral agreements in a writing should be protected against the assertion that other terms of the same agreement were not integrated in the writing. The limits of the integration are determined by the writing, read in the light of the surrounding circumstances. A written contract, however complete, yet covers only a limited field. I do not think that in the written contract for the conveyance of land here under consideration we can find an intention to cover a field so broad as to include prior agreements, if any such were made, to do other acts on other property after the stipulated conveyance was made.

In each case where such a problem is presented, varying factors enter into its solution. Citation of authority in this or other jurisdictions is useless, at least without minute analysis of the facts. The analysis I have made of the decisions in this state leads me to the view that the decision of the courts below is in accordance with our own authorities and should be affirmed.

CARDOZO, C. J., and POUND, KELLOGG and O'BRIEN, JJ., concur with ANDREWS, J.

LEHMAN, J., dissents in opinion in which CRANE, J., concurs.

Judgment accordingly.

(247 N. Y. 283)

HANLON v. UNION BANK OF MEDINA.

Court of Appeals of New York. Feb. 14, 1928.

Subrogation ⇐28—Accommodation maker who paid bankrupt's note held not entitled to proceeds of payee's continuing collateral which was insufficient to pay existing indebtedness.

Where maker of several notes held by defendant gave mortgage as continuing collateral security before bankruptcy, accommodation maker of one note who paid such note cannot claim from defendant portion of proceeds of collateral, where entire proceeds were insufficient to satisfy bankrupt's existing indebtedness to defendant, since there is no right to subrogation by part payment.

Appeal from Supreme Court, Appellate Division, Fourth Department.

Action by Mary Hanlon against the Union Bank of Medina. From a judgment of the Appellate Division (221 App. Div. 788, 223 N. Y. S. 871) affirming a judgment of the Special Term in favor of plaintiff, defendant appeals. Reversed, and complaint dismissed.

See, also, 221 App. Div. 837, 224 N. Y. S. 814.

Simon Fleischmann, of Buffalo, and Harry Cooper, of Medina, for appellant.

William H. Munson, of Medina, for respondent.

ANDREWS, J. In December, 1925, the Union Bank of Medina held some eleven notes, aggregating more than $21,000 of Francis E. Hanlon, some of which were indorsed by others. Among them was one payable on demand for $3,500 made by the plaintiff and Hanlon and indorsed by one Walsh. Of this note, the plaintiff was an accommodation maker, as the bank knew. It also held a mortgage for $14,000 given by Hanlon as continuing collateral security to secure his past and future indebtedness.

During that month Hanlon became a bankrupt. The bank then recovered a judgment against the plaintiff for the face of the $3,500, and issued execution. The judgment was paid and the note delivered to her. Thereafter the bank might enforce no claim against Hanlon or the indorser. It held its collateral as security for the balance of the indebtedness.

As for the plaintiff, she might doubtless, on paying this entire indebtedness, insist that she be subrogated to the bank's title to the collateral mortgage. Clearly this was the extent of her rights. She could not demand any pro rata or partial subrogation. McGrath v. Carnegie Trust Co., 221 N. Y. 92, 116 N. E. 787.

Later, in recognition of its claim to the collateral security, the receiver in bankruptcy turned over to the bank $14,000. It is said this was not a voluntary payment made by the debtor, but one made in the course of a judicial proceeding. Very possibly this may be true. At all events, we shall so assume for the purposes of this case. Then the application of this payment is made by the courts. How this should be done is described in Orleans County Nat. Bank v. Moore, 112 N. Y. 513, 20 N. E. 357, 3 L. R. A. 302, 8 Am. St. Rep. 775. With the application of this $14,000 when paid, actually made by the bank upon the various notes held by it, we are not here concerned. We

bleeding probably the night of the 16th, as a result of the stress and strain of that day's work. He went into considerable technical detail to support his opinion. To a significant extent this detail appears in his testimony on recall, which was not rebutted by the other medical witnesses.

Dr. Hayes, notwithstanding his opinion noted above, testified, "I would be willing to say that the majority of neurosurgeons in this community feel" that physical strain can induce an aneurysm to rupture. And he also testified he would not let a patient with a ruptured aneurysm go to work, because he would have him in the hospital preparing him for surgery. Both Dr. Sullivan and Dr. Rizzoli testified to substantially the same effect.

The Deputy Commissioner made no findings with respect to the testimony of physical stress and strain due to the work on the 16th or with respect to the absence of hospitalization and rest extending from the 13th through the 16th, as these circumstances bear upon the question of aggravation of the injury suffered on the 13th. All that was stated in the Findings of Fact in these respects was an abrupt, conclusory statement that the testimony of Doctors Sullivan, Rizzoli and Hayes "was the more reliable and convincing." Moreover, the dispute in the medical testimony as to possible further bleeding, due to the work on the 16th, was not the subject of findings which this court can look to in resolving the question whether the present decision has been reached by the Deputy Commissioner with the support of substantial evidence considering the record as a whole. And when we consider the importance the Deputy Commissioner appears to have accorded the numerous findings of absence of specific complaint by decedent and his wife that his condition was related to his work, when neither knew what his condition was, we must conclude that the decision of the Deputy Commissioner was influenced by these inconsequential matters. Finally, the wording of the decision suggests that the Deputy Commissioner did not take into consideration the presumptions favorable to the employee or his dependents.

The features of the decision to which we have referred, while not leading us to direct an award of benefits to appellants, compare Friend v. Britton, *supra*, do require that the order upon appeal be reversed, with directions that the decision of the Deputy Commissioner be set aside and the case remanded to the Deputy Commissioner for reconsideration, without prejudice to the reception of additional evidence if deemed desirable.

It is so ordered.

Ora Lee WILLIAMS, Appellant,

v.

WALKER-THOMAS FURNITURE COMPANY, Appellee.

William THORNE et al., Appellants,

v.

WALKER-THOMAS FURNITURE COMPANY, Appellee.

Nos. 18604, 18605.

United States Court of Appeals
District of Columbia Circuit.

Argued April 9, 1965.

Decided Aug. 11, 1965.

Suits by furniture company to recover on contracts under which balance due on every item purchased continued until balance due on all items, whenever purchased, was liquidated. The Court of General Sessions granted judgment for furniture company and appeal was taken. The District of Columbia Court of Appeals affirmed and appeal was taken. The United States Court of Appeals for the District of Columbia Circuit, J. Skelly Wright, Circuit Judge, held that where element of unconscionability is present at time contract is made, contract should

not be enforced and that inasmuch as trial court and appellate court had not recognized that contracts could be unenforceable on that basis and record was not sufficient for Court of Appeals to decide issue as matter of law, cases must be remanded to trial court for further proceedings.

Cases remanded.

Danaher, Circuit Judge, dissented.

1. Common Law ⇐14

That Congress enacted Uniform Commercial Code specifically providing that court may refuse to enforce contract which it finds to be unconscionable at time it was made does not mean that common law of District of Columbia was otherwise at time of enactment nor preclude court from adopting similar rule in exercise of its powers to develop common law for District of Columbia. D.C.Code 1961, § 28–2–302.

2. Contracts ⇐1

Where element of unconscionability is present at time contract is made, contract should not be enforced.

3. Contracts ⇐1

"Unconscionability" includes absence of meaningful choice on part of one of parties together with contract terms which are unreasonably favorable to the other party.

See publication Words and Phrases for other judicial constructions and definitions.

4. Contracts ⇐1

Whether meaningful choice is present in particular case as to one of parties to contract claimed to be unconscionable can only be determined by consideration of all circumstances surrounding transaction and may be negated by gross inequality of bargaining power.

5. Contracts ⇐1

Manner in which contract was entered into is relevant to determining whether meaningful choice was present on part of one of parties for purposes of deciding whether contract was unconscionable.

6. Contracts ⇐1

One-sided bargain is itself evidence of inequality of bargaining parties in determining whether contract was unconscionable.

7. Contracts ⇐99(1)

Fraud can be presumed from grossly unfair nature of terms of contract.

8. Contracts ⇐93(2)

Ordinarily, one who signs agreement without full knowledge of its terms may be held to assume risk that he has entered one-sided bargain.

9. Contracts ⇐1

When party of little bargaining power, and hence little real choice, signs commercially unreasonable contract with little or no knowledge of its terms, it is not likely that his consent or even objective manifestation of his consent was ever given to all the terms and, in such case, usual rule that terms of agreement are not to be questioned should be abandoned and court should consider whether terms of contract are so unfair that enforcement should be withheld.

10. Contracts ⇐1

Usually, terms of agreement are not to be questioned.

11. Contracts ⇐1

In determining reasonableness or fairness of contract, primary concern must be with terms of the contract considered in light of the circumstances existing when contract was made, but the test is not simple and cannot be mechanically applied.

12. Contracts ⇐1

Terms of contract are to be considered in light of general commercial background and commercial needs of particular trade or case in determining whether contract was reasonable or fair.

13. Contracts ⇐1

Test to be applied in those cases where no meaningful choice was exercised upon entering into contract are whether terms are so extreme as to appear unconscionable according to mores and business practices of time and place.

14. Courts ⇐406.9(9)

Inasmuch as trial court and appellate court did not recognize that contracts whereby balance due on purchases from retail furniture store was kept on every item purchased until balance due on all items, whenever purchased, was liquidated could be unenforceable on basis of being unconscionable and record was not sufficient for Court of Appeals to decide issue as matter of law, cases must be remanded to trial court for further proceedings.

Mr. Pierre E. Dostert, Washington, D. C., counsel for appellants in No. 18,605, argued for all appellants.

Mr. R. R. Curry, Washington, D. C., for appellant in No. 18,604.

Mr. Harry Protas, Washington, D. C., for appellee.

Mr. Gerhard P. Van Arkel (appointed by this court), Washington, D. C., as *amicus curiae*.

Before BAZELON, Chief Judge, and DANAHER and WRIGHT, Circuit Judges.

J. SKELLY WRIGHT, Circuit Judge:

Appellee, Walker-Thomas Furniture Company, operates a retail furniture store in the District of Columbia. During the period from 1957 to 1962 each appellant in these cases purchased a number of household items from Walker-Thomas, for which payment was to be made in installments. The terms of each purchase were contained in a printed form contract which set forth the value of the purchased item and purported to lease the item to appellant for a stipulated monthly rent payment. The contract then provided, in substance, that title would remain in Walker-Thomas until the total of all the monthly payments made equaled the stated value of the item, at which time appellants could take title. In the event of a default in the payment of any monthly installment, Walker-Thomas could repossess the item.

The contract further provided that "the amount of each periodical installment payment to be made by [purchaser] to the Company under this present lease shall be inclusive of and not in addition to the amount of each installment payment to be made by [purchaser] under such prior leases, bills or accounts; *and all payments now and hereafter made by [purchaser] shall be credited pro rata on all outstanding leases, bills and accounts* due the Company by [purchaser] at the time each such payment is made." Emphasis added.) The effect of this rather obscure provision was to keep a balance due on every item purchased until the balance due on all items, whenever purchased, was liquidated. As a result, the debt incurred at the time of purchase of each item was secured by the right to repossess all the items previously purchased by the same purchaser, and each new item purchased automatically became subject to a security interest arising out of the previous dealings.

On May 12, 1962, appellant Thorne purchased an item described as a Daveno, three tables, and two lamps, having total stated value of $391.10. Shortly thereafter, he defaulted on his monthly payments and appellee sought to replevy all the items purchased since the first transaction in 1958. Similarly, on April 17, 1962, appellant Williams bought a stereo set of stated value of $514.95.[1] She too defaulted shortly thereafter, and appellee sought to replevy all the items purchased since December, 1957. The Court of General Sessions granted judgment for appellee. The District of Columbia Court of Appeals affirmed, and we granted appellants' motion for leave to appeal to this court.

Appellants' principal contention, rejected by both the trial and the appellate courts below, is that these contracts, or at least some of them, are unconscionable and, hence, not enforceable. In its opin-

1. At the time of this purchase her account showed a balance of $164 still owing from her prior purchases. The total of all the purchases made over the years in question came to $1,800. The total payments amounted to $1,400.

ion in Williams v. Walker-Thomas Furniture Company, 198 A.2d 914, 916 (1964), the District of Columbia Court of Appeals explained its rejection of this contention as follows:

> "Appellant's second argument presents a more serious question. The record reveals that prior to the last purchase appellant had reduced the balance in her account to $164. The last purchase, a stereo set, raised the balance due to $678. Significantly, at the time of this and the preceding purchases, appellee was aware of appellant's financial position. The reverse side of the stereo contract listed the name of appellant's social worker and her $218 monthly stipend from the government. Nevertheless, with full knowledge that appellant had to feed, clothe and support both herself and seven children on this amount, appellee sold her a $514 stereo set.
>
> "We cannot condemn too strongly appellee's conduct. It raises serious questions of sharp practice and irresponsible business dealings. A review of the legislation in the District of Columbia affecting retail sales and the pertinent decisions of the highest court in this jurisdiction disclose, however, no ground upon which this court can declare the contracts in question contrary to public policy. We note that were the Maryland Retail Installment Sales Act, Art. 83 §§ 128–153, or its equivalent, in force in the District of Columbia, we could grant appellant appropriate relief. We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

We do not agree that the court lacked the power to refuse enforcement to contracts found to be unconscionable. In other jurisdictions, it has been held as a matter of common law that unconscionable contracts are not enforceable.[2] While no decision of this court so holding has been found, the notion that an unconscionable bargain should not be given full enforcement is by no means novel. In Scott v. United States, 79 U.S. (12 Wall.) 443, 445, 20 L.Ed. 438 (1870), the Supreme Court stated:

> "* * * If a contract be unreasonable and unconscionable, but not void for fraud, a court of law will give to the party who sues for its breach damages, not according to its letter, but only such as he is equitably entitled to. * * *"[3]

Since we have never adopted or rejected such a rule,[4] the question here presented is actually one of first impression.

[1, 2] Congress has recently enacted the Uniform Commercial Code, which specifically provides that the court may refuse to enforce a contract which it finds to be unconscionable at the time it was made. 28 D.C.CODE § 2–302 (Supp. IV 1965). The enactment of this section, which occurred subsequent to the contracts here in suit, does not mean that

2. Campbell Soup Co. v. Wentz, 3 Cir., 172 F.2d 80 (1948); Indianapolis Morris Plan Corporation v. Sparks, 132 Ind.App. 145, 172 N.E.2d 899 (1961); Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69, 84–96, 75 A.L.R.2d 1 (1960). *Cf.* 1 CORBIN, CONTRACTS § 128 (1963).

3. See Luing v. Peterson, 143 Minn. 6, 172 N.W. 692 (1919); Greer v. Tweed, N.Y. C.P., 13 Abb.Pr., N.S., 427 (1872); Schnell v. Nell, 17 Ind. 29 (1861); and see generally the discussion of the English authorities in Hume v. United States, 132 U.S. 406, 10 S.Ct. 134, 33 L.Ed. 393 (1889).

4. While some of the statements in the court's opinion in District of Columbia v. Harlan & Hollingsworth Co., 30 App.D.C. 270 (1908), may appear to reject the rule, in reaching its decision upholding the liquidated damages clause in that case the court considered the circumstances existing at the time the contract was made, see 30 App.D.C. at 279, and applied the usual rule on liquidated damages. See 5 CORBIN, CONTRACTS §§ 1054–1075 (1964); *Note*, 72 YALE L.J. 723, 746–755 (1963). Compare Jaeger v. O'Donoghue, 57 App.D.C. 191, 18 F.2d 1013 (1927).

the common law of the District of Columbia was otherwise at the time of enactment, nor does it preclude the court from adopting a similar rule in the exercise of its powers to develop the common law for the District of Columbia. In fact, in view of the absence of prior authority on the point, we consider the congressional adoption of § 2-302 persuasive authority for following the rationale of the cases from which the section is explicitly derived.[5] Accordingly, we hold that where the element of unconscionability is present at the time a contract is made, the contract should not be enforced.

[3-10] Unconscionability has generally been recognized to include an absence of meaningful choice on the part of one of the parties together with contract terms which are unreasonably favorable to the other party.[6] Whether a meaningful choice is present in a particular case can only be determined by consideration of all the circumstances surrounding the transaction. In many cases the meaningfulness of the choice is negated by a gross inequality of bargaining power.[7] The manner in which the contract was entered is also relevant to this consideration. Did each party to the contract, considering his obvious education or lack of it, have a reasonable opportunity to understand the terms of the contract, or were the important terms hidden in a maze of fine print and minimized by deceptive sales practices? Ordinarily, one who signs an agreement without full knowledge of its terms might be held to assume the risk that he has entered a one-sided bargain.[8] But when a party of little bargaining power, and hence little real choice, signs a commercially unreasonable contract with little or no knowledge of its terms, it is hardly likely that his consent, or even an objective manifestation of his consent, was ever given to all the terms. In such a case the usual rule that the terms of the

5. See Comment, § 2-302, Uniform Commercial Code (1962). Compare *Note*, 45 VA.L.REV. 583, 590 (1959), where it is predicted that the rule of § 2-302 will be followed by analogy in cases which involve contracts not specifically covered by the section. *Cf.* 1 STATE OF NEW YORK LAW REVISION COMMISSION, REPORT AND RECORD OF HEARINGS ON THE UNIFORM COMMERCIAL CODE 108-110 (1954) (remarks of Professor Llewellyn).

6. See Henningsen v. Bloomfield Motors, Inc., *supra* Note 2; Campbell Soup Co. v. Wentz, *supra* Note 2.

7. See Henningsen v. Bloomfield Motors, Inc., *supra* Note 2, 161 A.2d at 86, and authorities there cited. Inquiry into the relative bargaining power of the two parties is not an inquiry wholly divorced from the general question of unconscionability, since a one-sided bargain is itself evidence of the inequality of the bargaining parties. This fact was vaguely recognized in the common law doctrine of intrinsic fraud, that is, fraud which can be presumed from the grossly unfair nature of the terms of the contract. See the oft-quoted statement of Lord Hardwicke in Earl of Chesterfield v. Janssen, 28 Eng. Rep. 82, 100 (1751):

> "* * * [Fraud] may be apparent from the intrinsic nature and subject of the bargain itself; such as no man in his senses and not under delusion would make * * *."

And *cf.* Hume v. United States, *supra* Note 3, 132 U.S. at 413, 10 S.Ct. at 137, where the Court characterized the English cases as "cases in which one party took advantage of the other's ignorance of arithmetic to impose upon him, and the fraud was apparent from the face of the contracts." See also Greer v. Tweed, *supra* Note 3.

8. See RESTATEMENT, CONTRACTS § 70 (1932); *Note*, 63 HARV.L.REV. 494 (1950). See also Daley v. People's Building, Loan & Savings Ass'n, 178 Mass. 13, 59 N.E. 452, 453 (1901), in which Mr. Justice Holmes, while sitting on the Supreme Judicial Court of Massachusetts, made this observation:

> "* * * Courts are less and less disposed to interfere with parties making such contracts as they choose, so long as they interfere with no one's welfare but their own. * * * It will be understood that we are speaking of parties standing in an equal position where neither has any oppressive advantage or power * * *."

agreement are not to be questioned[9] should be abandoned and the court should consider whether the terms of the contract are so unfair that enforcement should be withheld.[10]

[11–13] In determining reasonableness or fairness, the primary concern must be with the terms of the contract considered in light of the circumstances existing when the contract was made. The test is not simple, nor can it be mechanically applied. The terms are to be considered "in the light of the general commercial background and the commercial needs of the particular trade or case." [11] Corbin suggests the test as being whether the terms are "so extreme as to appear unconscionable according to the mores and business practices of the time and place." 1 CORBIN, *op. cit. supra* Note 2.[12] We think this formulation correctly states the test to be applied in those cases where no meaningful choice was exercised upon entering the contract.

[14] Because the trial court and the appellate court did not feel that enforcement could be refused, no findings were made on the possible unconscionability of the contracts in these cases. Since the record is not sufficient for our deciding the issue as a matter of law, the cases must be remanded to the trial court for further proceedings.

So ordered.

DANAHER, Circuit Judge (dissenting):

The District of Columbia Court of Appeals obviously was as unhappy about the situation here presented as any of us can possibly be. Its opinion in the *Williams* case, quoted in the majority text, concludes: "We think Congress should consider corrective legislation to protect the public from such exploitive contracts as were utilized in the case at bar."

My view is thus summed up by an able court which made no finding that there had actually been sharp practice. Rather the appellant seems to have known precisely where she stood.

There are many aspects of public policy here involved. What is a luxury to some may seem an outright necessity to others. Is public oversight to be required of the expenditures of relief funds? A washing machine, e. g., in the hands of a relief client might become a fruitful source of income. Many relief clients may well need credit, and certain business establishments will take long chances on the sale of items, expecting their pricing policies will afford a degree of protection commensurate with the risk. Perhaps a remedy when necessary will be found within the provisions of the "Loan Shark" law, D.C.CODE §§ 26–601 *et seq.* (1961).

I mention such matters only to emphasize the desirability of a cautious approach to any such problem, particularly since the law for so long has allowed parties such great latitude in making their own contracts. I dare say there must annually be thousands upon thousands of installment credit transactions in this jurisdiction, and one can only speculate

9. This rule has never been without exception. In cases involving merely the transfer of unequal amounts of the same commodity, the courts have held the bargain unenforceable for the reason that "in such a case, it is clear, that the law cannot indulge in the presumption of equivalence between the consideration and the promise." 1 WILLISTON, CONTRACTS § 115 (3d ed. 1957).

10. See the general discussion of "Boiler-Plate Agreements" in LLEWELLYN, THE COMMON LAW TRADITION 362–371 (1960).

11. Comment, Uniform Commercial Code § 2–307.

12. See Henningsen v. Bloomfield Motors, Inc., *supra* Note 2; Mandel v. Liebman, 303 N.Y. 88, 100 N.E.2d 149 (1951). The traditional test as stated in Greer v. Tweed, *supra* Note 3, 13 Abb.Pr.,N.S., at 429, is "such as no man in his senses and not under delusion would make on the one hand, and as no honest or fair man would accept, on the other."

as to the effect the decision in these cases will have.[1]

I join the District of Columbia Court of Appeals in its disposition of the issues.

MANHATTAN-BRONX POSTAL UNION et al., Appellants,
v.
John A. GRONOUSKI, individually and as Postmaster General of the United States, Appellee.
No. 18382.

United States Court of Appeals
District of Columbia Circuit.

Argued March 16, 1965.

Decided July 29, 1965.

Action by postal employee and organization of which he was a member for declaratory and injunctive relief against Postmaster General in official and individual capacities on complaint growing out of his refusal to recognize organization as representative of postal employees. The United States District Court for the District of Columbia, Leonard P. Walsh, J., dismissed the complaint, and the plaintiffs appealed. The Court of Appeals, McGowan, Circuit Judge, held that action was one against the United States which could not be maintained without its consent and rights which plaintiffs sought to assert were not appropriate for judicial vindication.

Affirmed.

1. United States ⇐125(28)

Action in which named defendant was Postmaster General both in that capacity and as individual and which was brought on allegations that use of authorization card system in determination of whether to extend "formal recognition" to organizations as representatives of postal employees was unfair and that plaintiff organization was entitled to exclusive representational status for certain employees in city post office was one against the United States which could not be maintained without its consent. Executive Order No. 10988, § 1 et seq., 5 U.S.C.A. § 631 note.

2. United States ⇐125(24)

A plaintiff's denomination of party defendant is not test of whether suit is in fact against the United States, the crucial question is whether relief sought is against the sovereign.

3. United States ⇐125(24)

A suit is against the United States if judgment sought would require payment of public funds or entail transfer of public lands or if it would interfere with public administration by either restraining government from acting or requiring it to act.

4. United States ⇐125(28)

Even if Postmaster General's adherence to rule that where less than absolute majority of employees concerned vote for one organization as representative, there must be majority of those voting, defined as minimum of 60 per cent of eligible voters, was violative of Executive Order pursuant to which it was promulgated, Postmaster General's actions were not thereby clearly beyond his legal authority so as to make suit complaining of his actions under rule one against him individually rather than against the United States. Executive Order No. 10988, § 1 et seq., 5 U.S.C.A. § 631 note.

5. United States ⇐40

Officer of the United States does not act outside his authority whenever he acts upon an erroneous decision of law or fact if he is empowered to make the decision.

1. However the provision ultimately may be applied or in what circumstances, D.C. CODE § 28-2-301 (Supp. IV, 1965) did not become effective until January 1, 1965.

and the buyer (who has tendered the return of the item) for the down payment. How should the claims be decided? See Smith v. Zimbalist, 38 P.2d 170 (Cal.App. 1934).

SECTION 2. IMPRACTICABILITY OF PERFORMANCE

Recall Stees v. Leonard: "If a man bind himself, by a positive, express contract, to do an act in itself possible, he must perform his engagement, unless prevented by the act of God, the law, or the other party to the contract. No hardship, no unforeseen hindrance, no difficulty short of absolute impossibility, will excuse him from doing what he has expressly agreed to do."

Of course many contractual undertakings are not "absolute" in this sense. Take, for example, the obligations of Otis Wood (p. 83 above) and Falstaff Brewing (p. 619 above) to use reasonable efforts. In the rest of this chapter, however, we explore the limits of more specific undertakings. To what extent is even an "absolute" contractual undertaking affected by a change of circumstances after the contract is made?

Centuries ago, in Paradine v. Jane, Aleyn 26, 82 Eng.Rep. 897 (Kings Bench 1647), the court gave reasons for the proposition that a contract duty—in this instance, a duty to pay rent—is absolute in the sense that no excuse based on changed conditions has been recognized. First, the court said that even if a change makes a party's performance impossible, "he might have provided against it in his contract." (If that was ever the rule, it has long since been subjected to some important qualifications.) Second, the court said that because a party "is to have the advantage of casual profits, so he must run the hazard of casual losses." In other words, a contract should impose matching burdens on the parties, so that a party that could take advantage of a favorable change in circumstances ought to bear the risk of an unfavorable one. Both of these reasons are echoed in later cases and continue to be effective as argument, on occasion.

NOTES

(1) *Specific Result or Reasonable Efforts?* Whether a commitment is one to achieve a specific result, or is one only to use reasonable efforts to do so is sometimes unclear. The difference may be critical if changed circumstances have made the result harder to achieve. In City of Mounds View v. Walijarvi, 263 N.W.2d 420 (Minn.1978), the court that decided Stees v. Leonard rejected the argument that an architect's undertaking was to achieve a specific result—an implied warranty that the structure was fit for its intended purpose—and had this to say:

"Architects, doctors, engineers, attorneys, and others deal in somewhat inexact sciences and are continually called upon to exercise their skilled judgment in order to anticipate and provide for random factors which are incapable of precise measurement. The indeterminate nature of these factors makes it impossible for professional service people to gauge them with complete accuracy in every instance. Thus, doctors cannot promise that every operation will be successful; a lawyer can never be certain that a contract he drafts is without latent ambiguity; and an architect cannot be certain that a structural design will interact with natural forces

as anticipated. Because of the inescapable possibility of error which inheres in these services, the law has traditionally required, not perfect results, but rather the exercise of that skill and judgment which can be reasonably expected from similarly situated professionals."

For a different view, see Tamarac Development Co., Inc. v. Delamater, Freund & Associates, P.A., 675 P.2d 361 (Kan.1984), reasoning that the "work performed by architects and engineers is an exact science; that performed by doctors and lawyers is not."

Do professionals never undertake to achieve a specific result? See Sullivan v. O'Connor, p. 8 above. Do nonprofessionals always undertake to achieve a specific result? See Bloor v. Falstaff Brewing Corp., p. 619 above. Absent explicit provision, what factors other than professionalism might affect the classification? See Milau Associates, Inc. v. North Avenue Development Corp., 368 N.E.2d 1247 (N.Y.1977). For a distinction between a duty of best efforts and a duty to achieve a specific result, see articles 5.4 and 5.5 of the UNIDROIT Principles.

(2) *Death and Illness.* A duty to perform a "personal" service (one that cannot be delegated to another to perform) is usually excused when the person required to perform suffers death or injury. Cardozo stated the point in connection with the death of a person while engaged in decorative work on a structure: "The contract being personal, the effect of his death was to terminate the duty of going forward with performance...." Buccini v. Paterno Construction Co., 170 N.E. 910, 911 (N.Y.1930).

Not only a death, but also a malady, may discharge a contract obligation. In Oneal v. Colton Consolidated School District No. 306, 557 P.2d 11 (Wash.App.1976), a school teacher's duty was discharged by deterioration of his vision. Moreover, not only illness but the "apprehension" of illness may excuse. See Wasserman Theatrical Enterprise v. Harris, 77 A.2d 329 (Conn.1950), in which Walter Huston, the actor, was excused from appearing on stage because of a minor throat ailment.

Taylor v. Caldwell

King's Bench, 1863.
3 B. & S. 826, 122 Eng.Rep. 309.

[Action for breach of a written agreement by which defendants contracted to "let" the Surrey Gardens and Music Hall, at Newington, Surrey, to plaintiffs, for four days, for the purpose of giving four "grand concerts" and "day and night fêtes" in the hall; plaintiffs agreeing to pay £100 at the close of each day. The defendants agreed to furnish a band and certain other amusements in connection with plaintiffs' entertainments, but the plaintiffs were to have all moneys paid for entrance to the music hall and gardens. The plaintiffs alleged the defendants' breach, "Whereby the plaintiffs lost divers moneys paid by them for printing advertisements of and in advertising the concerts, and also lost divers sums expended and expenses incurred by them in preparing for the concerts and otherwise in relation thereto, and on the faith of the performance by the defendants of the agreement on their part". The defendants pleaded that the Gardens and Music Hall were accidentally destroyed by fire on June 11, 1861, without the default of the defendants or either of them. A verdict was

returned for the plaintiffs, with leave reserved to enter a verdict for defendants.]

■ BLACKBURN, J. In this case the plaintiffs and defendants had, on the 27th May, 1861, entered into a contract by which the defendants agreed to let the plaintiffs have the use of The Surrey Gardens and Music Hall on four days then to come, viz., the 17th June, 15th July, 5th August and 19th August, for the purpose of giving a series of four grand concerts, and day and night fêtes at the Gardens and Hall on those days respectively; and the plaintiffs agreed to take the Gardens and Hall on those days, and pay £100 for each day.

[The court interpreted the agreement not to be a lease, and concluded that the entertainments provided for in the agreement could not be given without the existence of the Music Hall.]

After the making of the agreement, and before the first day on which a concert was to be given, the Hall was destroyed by fire. This destruction, we must take it on the evidence, was without the fault of either party, and was so complete that in consequence the concerts could not be given as intended. And the question we have to decide is whether, under these circumstances, the loss which the plaintiffs have sustained is to fall upon the defendants. The parties when framing their agreement evidently had not present to their minds the possibility of such a disaster, and have made no express stipulation with reference to it, so that the answer to the question must depend upon the general rules of law applicable to such a contract.

There seems no doubt that where there is a positive contract to do a thing, not in itself unlawful, the contractor must perform it or pay damages for not doing it, although in consequence of unforeseen accidents, the performance of his contract has become unexpectedly burdensome or even impossible. The law is so laid down in 1 Roll.Abr. 450, Condition (G), and in the note (2) to Walton v. Waterhouse, 2 Wms.Saund. 421a. 6th Ed., and is recognised as the general rule by all the Judges in the much discussed case of Hall v. Wright (E.B. & E. 746). But this rule is only applicable when the contract is positive and absolute, and not subject to any condition either express or implied: and there are authorities which, as we think, establish the principle that where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless when the time for the fulfillment of the contract arrived some particular specified thing continued to exist, so that, when entering into the contract, they must have contemplated such continuing existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be construed as a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor.

There seems little doubt that this implication tends to further the great object of making the legal construction such as to fulfil the intention of those who entered into the contract. For in the course of affairs men in

making such contracts in general would if it were brought to their minds, say that there should be such a condition.

Accordingly, in the Civil law, such an exception is implied in every obligation of the class which they call obligatio de certo corpore. The rule is laid down in the Digest, lib. XLV, tit. 1, de verborum obligationibus, 1.33. "Si Stichus certo die dari promissus, ante diem moriatur: non tenetur promissor." The principle is more fully developed in 1.23. "Si ex legati causa, aut ex stipulatu hominem certum mihi debeas: non aliter post mortem ejus tenearis mihi, quam si per te steterit, quominus vivo eo eum mihi dares: quod ita fit, si aut interpellatus non dedisti, aut occidisti eum." The examples are of contracts respecting a slave, which was the common illustration of a certain subject used by the Roman lawyers, just as we are apt to take a horse; and no doubt the propriety, one might almost say necessity, of the implied condition is more obvious when the contract relates to a living animal, whether man or brute, than when it relates to some inanimate thing (such as in the present case a theatre) the existence of which is not so obviously precarious as that of the live animal, but the principle is adopted in the Civil law as applicable to every obligation of which the subject is a certain thing. The general subject is treated of by Pothier, who in his Traite des Obligations, partie 3, chap. 6, art. 3, sec. 668, states the result to be that the debtor corporis certi is freed from his obligation when the thing has perished, neither by his act, nor his neglect, and before he is in default, unless by some stipulation he has taken on himself the risk of the particular misfortune which has occurred.[a]

Although the Civil law is not of itself authority in an English Court, it affords great assistance in investigating the principles on which the law is grounded. And it seems to us that the common law authorities establish that in such a contract the same condition of the continued existence of the thing is implied by English law.

[The court referred to instances of a performance unfulfilled at the death of the promisor, saying, "[I]t was very early determined that, if the performance is personal, the executors are not liable." (See Note 2 above.)]

These are instances where the implied condition is of the life of a human being, but there are others in which the same implication is made as to the continued existence of a thing. . . .

[In Williams v. Lloyd W. Jones, 179] the count, which was in assumpsit, alleged that the plaintiff had delivered a horse to the defendant, who promised to redeliver it on request. Breach, that though requested to redeliver the horse he refused. Plea, that the horse was sick and died, and the plaintiff made the request after its death; and on demurrer it was held a good plea, as the bailee was discharged from his promise by the death of the horse without default or negligence on the part of the defendant. "Let it be admitted," say the Court "that he promised to deliver it on request, if the horse die before, that is become impossible by the act of God, so the

a. For a criticism of the Roman law authorities relied upon by Blackburn, J., see Buckland, *Casus* and Frustration in Roman and Common Law, 46 Harv.L.Rev. 1281, 1287–89 (1933).

party shall be discharged as much as if an obligation were made conditioned to deliver the horse on request, and he died before it."[b]

It may, we think, be safely asserted to be now English law, that in all contracts of loan of chattels or bailments if the performance of the promise of the borrower or bailee to return the things lent or bailed, becomes impossible because it [sic] has perished, this impossibility (if not arising from the fault of the borrower or bailee from some risk which he has taken upon himself) excuses the borrower or bailee from the performance of his promise to redeliver the chattel.

The great case of Coggs v. Bernard (1 Smith's L.C. 171, 5th ed.; 2 L.Raym. 909) is now the leading case on the law of bailments, and Lord Holt, in that case, referred so much to the Civil law that it might perhaps be thought that this principle was there delivered direct from the civilians, and was not generally applicable in English law except in the case of bailments; but the case of Williams v. Lloyd (W. Jones, 179), above cited, shows that the same law had been already adopted by the English law as early as The Book of Assizes. The principle seems to us to be that, in contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance.

In none of these cases is the promise in words other than positive, nor is there any express stipulation that the destruction of the person or thing shall excuse the performance; but that excuse is by law implied, because from the nature of the contract it is apparent that the parties contracted on the basis of the continued existence of the particular person or chattel. In the present case, looking at the whole contract, we find that the parties contracted on the basis of the continued existence of the Music Hall at the time when the concerts were to be given; that being essential to their performance.

We think, therefore, that the Music Hall having ceased to exist, without fault of either party, both parties are excused, the plaintiffs from taking the gardens and paying the money, the defendants from performing their promise to give the use of the Hall and Gardens and other things. Consequently the rule must be absolute to enter the verdict for the defendants.

NOTE

"Tiger Days Excepted". By 1922 it was possible, in a British court, to ridicule the notion that when a post-contract event impedes the performance of a party, and so excuses that performance, the result depends on a condition, explicit or implicit, in the parties' agreement. In that year a Scottish judge felt bound to that notion, owing to its acceptance in the House of Lords. But he expressed doubt, saying:

b. But at an earlier period the bailee was not excused. O.W. Holmes, The Common Law 176 et seq. (1881).

> It does seem to me somewhat far-fetched to hold that the non-occurrence of some event, which was not within the contemplation or even the imagination of the parties, was an implied term of the contract.... A tiger has escaped from a travelling menagerie. The milkgirl fails to deliver the milk. Possibly the milkman may be exonerated from any breach of contract; but, even so, it would seem hardly reasonable to base that exoneration on the ground that 'tiger days excepted' must be held as if written into the milk contract.

Scott & Sons v. Del Sel, 1922 Sess.Cas. 592, 596–97, aff'd, 1923 Sess.Cas. (House of Lords) 37.

Compare this passage in the Restatement Second, introducing Chapter 11: "An extraordinary circumstance may make performance so vitally different from what was reasonably to be expected as to alter the essential nature of that performance. In such a case the court must determine whether justice requires a departure from the general rule that the obligor bear the risk that the contract may become more burdensome or less desirable. This Chapter is concerned with the principles that guide that determination.... In recent years courts have shown increasing liberality in discharging obligors on the basis of such extraordinary circumstances."

Transatlantic Financing Corporation v. United States

United States Court of Appeals, D.C.Circuit, 1966.
363 F.2d 312.

■ J. SKELLY WRIGHT, CIRCUIT JUDGE. This appeal involves a voyage charter between Transatlantic Financing Corporation, operator of the SS CHRISTOS, and the United States covering carriage of a full cargo of wheat from a United States Gulf port to a safe port in Iran. The District Court dismissed a libel filed by Transatlantic against the United States for costs attributable to the ship's diversion from the normal sea route caused by the closing of the Suez Canal. We affirm.

On July 26, 1956, the Government of Egypt nationalized the Suez Canal Company and took over operation of the Canal. On October 2, 1956, during the international crisis which resulted from the seizure, the voyage charter in suit was executed between representatives of Transatlantic and the United States. The charter indicated the termini of the voyage but not the route. On October 27, 1956, the SS CHRISTOS sailed from Galveston for Bandar Shapur, Iran, on a course which would have taken her through Gibraltar and the Suez Canal. On October 29, 1956, Israel invaded Egypt. On October 31, 1956, Great Britain and France invaded the Suez Canal Zone. On November 2, 1956, the Egyptian Government obstructed the Suez Canal with sunken vessels and closed it to traffic.[a]

a. For another chronology of events see Fry, The Suez Crisis, 1956, 15, 19, and 24 (Georgetown Institute for the Study of Diplomacy 1992). Among the events listed are these:

Britain and France began military planning for an invasion of Egypt on August 2. They informed the U.N. Security Council, on September 12, that Egypt's rejection of certain proposals constituted a threat to international peace and security. The European canal pilots left Egypt on September 15. Israeli forces attacked Egypt in Sinai on October 29. Egypt sank ships in the canal, thereby blocking it, on November 4. On the following day British and French paratroops were dropped at the north end of the canal. On November 7

On or about November 7, 1956, Beckmann, representing Transatlantic, contacted Potosky, an employee of the United States Department of Agriculture, who appellant concedes was unauthorized to bind the Government, requesting instructions concerning disposition of the cargo and seeking an agreement for payment of additional compensation for a voyage around the Cape of Good Hope. Potosky advised Beckmann that Transatlantic was expected to perform the charter according to its terms, that he did not believe Transatlantic was entitled to additional compensation for a voyage around the Cape, but that Transatlantic was free to file such a claim. Following this discussion, the CHRISTOS changed course for the Cape of Good Hope and eventually arrived in Bandar Shapur on December 30, 1956.

Transatlantic's claim is based on the following train of argument. The charter was a contract for a voyage from a Gulf port to Iran. Admiralty principles and practices, especially stemming from the doctrine of deviation, require us to imply into the contract the term that the voyage was to be performed by the "usual and customary" route. The usual and customary route from Texas to Iran was, at the time of contract, via Suez, so the contract was for a voyage from Texas to Iran via Suez. When Suez was closed this contract became impossible to perform. Consequently, appellant's argument continues, when Transatlantic delivered the cargo by going around the Cape of Good Hope, in compliance with the Government's demand under claim of right, it conferred a benefit upon the United States for which it should be paid in *quantum meruit.*

The doctrine of impossibility of performance has gradually been freed from the earlier fictional and unrealistic strictures of such tests as the "implied term" and the parties' "contemplation." Page, The Development of the Doctrine of Impossibility of Performance, 18 Mich.L.Rev. 589, 596 (1920). See generally 6 Corbin, Contracts §§ 1320–1372 (rev. ed. 1962); 6 Williston, Contracts §§ 1931–1979 (rev. ed. 1938). It is now recognized that " 'A thing is impossible in legal contemplation when it is not practicable; and a thing is impracticable when it can only be done at an excessive and unreasonable cost.' " Mineral Park Land Co. v. Howard, 172 Cal. 289, 293, 156 P. 458, 460, L.R.A.1916F, 1 (1916). Accord, Whelan v. Griffith Consumers Company, D.C.Mun.App., 170 A.2d 229 (1961); Restatement, Contracts § 454 (1932); Uniform Commercial Code (U.L.A.) § 2–615, comment 3. The doctrine ultimately represents the ever-shifting line, drawn by courts hopefully responsive to commercial practices and mores, at which the community's interest in having contracts enforced according to their terms is outweighed by the commercial senselessness of requiring performance.[1] When the issue is raised, the court is asked to construct a condition of

(Middle East time) a cease-fire went into effect.

1. While the impossibility issue rarely arises, as it has here, in a suit to recover the cost of an alternative method of performance, compare Annot., 84 A.L.R.2d 12, 19 (1962), there is nothing necessarily inconsistent in claiming commercial impracticability for the method of performance actually adopted; the concept of impracticability assumes performance was physically possible. Moreover, a rule making nonperformance a condition precedent to recovery would unjustifiably encourage disappointment of expectations.

performance[2] based on the changed circumstances, a process which involves at least three reasonably definable steps. First, a contingency—something unexpected—must have occurred. Second, the risk of the unexpected occurrence must not have been allocated either by agreement or by custom. Finally, occurrence of the contingency must have rendered performance commercially impracticable.[3] Unless the court finds these three requirements satisfied, the plea of impossibility must fail.

The first requirement was met here. It seems reasonable, where no route is mentioned in a contract, to assume the parties expected performance by the usual and customary route at the time of contract.[4] Since the usual and customary route from Texas to Iran at the time of contract[5] was through Suez, closure of the Canal made impossible the expected method of performance. But this unexpected development raises rather than resolves

2. Patterson, Constructive Conditions in Contracts, 42 Colum.L.Rev. 903, 943–954 (1942).

3. Compare Uniform Commercial Code § 2–615(a), which provides that, in the absence of an assumption of greater liability, delay or non-delivery by a seller is not a breach if performance as agreed is made "impracticable" by the occurrence of a "contingency" the non-occurrence of which was a "basic assumption on which the contract was made." To the extent this limits relief to "unforeseen" circumstances, comment 1, see the discussion below, and compare Uniform Commercial Code § 2–614(1). There may be a point beyond which agreement cannot go, Uniform Commercial Code § 2–615, comment 8, presumably the point at which the obligation would be "manifestly unreasonable," § 1–102(3), in bad faith, § 1–203, or unconscionable, § 2–302. For an application of these provisions see Judge Friendly's opinion in United States v. Wegematic Corporation, 2 Cir., 360 F.2d 674 (1966).

4. Uniform Commercial Code § 2–614, comment 1, states: "Under this Article, in the absence of specific agreement, the normal or usual facilities enter into the agreement either through the circumstances, usage of trade or prior course of dealing." So long as this sort of assumption does not necessarily result in construction of a condition of performance, it is idle to argue over whether the usual and customary route is an "implied term." The issue of impracticability must eventually be met. One court refused to imply the Suez route as a contract term, but went on to rule the contract had been "frustrated." Carapanayoti & Co. Ltd. v. E.T. Green Ltd., [1959] 1 Q.B. 131. The holding was later rejected by the House of Lords. Tsakiroglou & Co. Ltd. v. Noblee Thorl G.m.b.H., [1960] 2 Q.B. 348.

5. The parties have spent considerable energy in disputing whether the "usual and customary" route by which performance was anticipated is defined as of the time of contract or of performance. If we were automatically to treat the expected route as a condition of performance, this matter would be crucial, and we would be compelled to choose between unacceptable alternatives. If we assume as a constructive condition the usual and customary course always to mean the one in use at the time of contract, any substantial diversion (we assume the diversion would have to be substantial) would nullify the contract even though its effect upon the rights and obligations of the parties is insignificant. Nor would it be desirable, on the other hand, to assume performance is conditioned on the availability of *any* usual and customary route at the time of performance. It may be that very often the availability of a customary route at the time of performance other than the route expected to be used at the time of contract should result in denial of relief under the impossibility theory; certainly if *no* customary route is available at the time of performance the contract is rendered impossible. But the same customarily used alternative route may be practicable in one set of circumstances and impracticable in another, as where the goods are unable to survive the extra journey. Moreover, the "time of performance" is no special point in time; it is every moment in a performance. Thus the alternative route, in our case around the Cape, may be practicable at some time during performance, for example while the vessel is still in the Atlantic Ocean, and impracticable at another time during performance, for example after the vessel has traversed most of the Mediterranean Sea. Both alternatives, therefore, have their shortcomings, and we avoid choosing between them by refusing automatically to treat the usual and customary route as of any time as a condition of performance.

the impossibility issue, which turns additionally on whether the risk of the contingency's occurrence had been allocated and, if not, whether performance by alternative routes was rendered impracticable.[6]

Proof that the risk of a contingency's occurrence has been allocated may be expressed in or implied from the agreement. Such proof may also be found in the surrounding circumstances, including custom and usages of the trade. See 6 Corbin, supra, § 1339, at 394–397; 6 Williston, supra, § 1948, at 5457–5458. The contract in this case does not expressly condition performance upon availability of the Suez route. Nor does it specify "via Suez" or, on the other hand, "via Suez or Cape of Good Hope."[7] Nor are there provisions in the contract from which we may properly imply that the continued availability of Suez was a condition of performance.[8] Nor is

6. In criticizing the "contemplation" test for impossibility Professor Patterson pointed out: " 'Contemplation' is appropriate to describe the mental state of philosophers but is scarcely descriptive of the mental state of business men making a bargain. It seems preferable to say that the promisee *expects* performance by [the] means . . . the promisor expects to (or which on the facts known to the promisee it is probable that he will) use. It does not follow as an inference of fact that the promisee expects performance by *only* that means. . . ." Patterson, supra Note 2, at 947.

7. In Glidden Company v. Hellenic Lines, Limited, 2 Cir., 275 F.2d 253 (1960), the charter was for transportation of materials from India to America "via Suez Canal or Cape of Good Hope, or Panama Canal," and the court held performance was not "frustrated." In his discussion of this case, Professor Corbin states: "Except for the provision for an alternative route, the defendant would have been discharged, for the reason that the parties contemplated an open Suez Canal as a specific condition or means of performance." 6 Corbin, supra, § 1339, at 399 n. 57. Appellant claims this supports its argument, since the Suez route was contemplated as usual and customary. But there is obviously a difference, in deciding whether a contract allocates the risk of a contingency's occurrence, between a contract specifying no route and a contract specifying Suez. We think that when Professor Corbin said, "Except for the provision for an alternative route," he was referring, not to the entire *provision*—"via Suez Canal or Cape of Good Hope" etc.—but to the fact that *an alternative route* had been provided for. Moreover, in determining what Corbin meant when he said "the parties contemplated an open Suez Canal as a specific condition or means of performance," consideration must be given to the fact, recited by Corbin, that in *Glidden* the parties were specifically aware when the contract was made the Canal might be closed, and the promisee had refused to include a clause excusing performance in the event of closure. Corbin's statement, therefore, is most accurately read as referring to cases in which a route is specified after negotiations reflecting the parties' awareness that the usual and customary route might become unavailable. Compare Held v. Goldsmith, 153 La. 598, 96 So. 272 (1919).

8. The charter provides that the vessel is "in every way fitted for *the voyage*" (emphasis added), and the "P. & I. Bunker Deviation Clause" refers to "the contract voyage" and the "direct and/or customary route." Appellant argues that these provisions require implication of a voyage by the direct and customary route. Actually they prove only what we are willing to accept—that the parties expected the usual and customary route would be used. The provisions in no way condition performance upon nonoccurrence of this contingency.

There are two clauses which allegedly demonstrate that time is of importance in this contract. One clause computes the remuneration "in steaming time" for diversions to other countries ordered by the charterer in emergencies. This proves only that the United States wished to reserve power to send the goods to another country. It does not imply in any way that either was in a rush about the matter. The other clause concerns demurrage and despatch. The charterer agreed to pay Transatlantic demurrage of $1,200 per day for all time in excess of the period agreed upon for loading and unloading, and Transatlantic was to pay despatch of $600 per day for any saving in time. Of course this provision shows the parties were concerned about time, see Gilmore & Black, The Law of Admiralty § 4–8 (1957), but the fact that they arranged so minutely the consequences of any delay or speedup of loading and unloading operates against the argument that they were similarly allocating the risk of delay or speed-up of the voyage.

there anything in custom or trade usage, or in the surrounding circumstances generally, which would support our constructing a condition of performance. The numerous cases requiring performance around the Cape when Suez was closed, see e.g., Ocean Tramp Tankers Corp. v. V/O Sovfracht (The Eugenia), [1964] 2 Q.B. 226, and cases cited therein, indicate that the Cape route is generally regarded as an alternative means of performance. So the implied expectation that the route would be via Suez is hardly adequate proof of an allocation to the promisee of the risk of closure. In some cases, even an express expectation may not amount to a condition of performance.[9] The doctrine of deviation supports our assumption that parties normally expect performance by the usual and customary route, but it adds nothing beyond this that is probative of an allocation of the risk.[10]

If anything, the circumstances surrounding this contract indicate that the risk of the Canal's closure may be deemed to have been allocated to Transatlantic. We know or may safely assume that the parties were aware, as were most commercial men with interests affected by the Suez situation, see The Eugenia, supra, that the Canal might become a dangerous area. No doubt the tension affected freight rates, and it is arguable that the risk of closure became part of the dickered terms. Uniform Commercial Code § 2–615, comment 8. We do not deem the risk of closure so allocated, however. Foreseeability or even recognition of a risk does not necessarily prove its allocation.[11] Compare Uniform Commercial Code § 2–615, Comment 1; Restatement, Contracts § 457 (1932). Parties to a contract are not always able to provide for all the possibilities of which they are aware, sometimes because they cannot agree, often simply because they are too busy. More-

9. Uniform Commercial Code § 2–614(1) provides: "Where without fault of either party ... the *agreed* manner of delivery ... becomes commercially impracticable but a commercially reasonable substitute is available, such substitute performance must be tendered and accepted." (Emphasis added.) Compare Mr. Justice Holmes' observation: "You can give any conclusion a logical form. You always can imply a condition in a contract. But why do you imply it? It is because of some belief as to the practice of the community or of a class, or because of some opinion as to policy...." Holmes, The Path of the Law, 10 Harv.L.Rev. 457, 466 (1897).

10. The deviation doctrine, drawn principally from admiralty insurance practice, implies into all relevant commercial instruments naming the termini of voyages the usual and customary route between those points. 1 Arnould, Marine Insurance and Average § 376, at 522 (10th ed. 1921). Insurance is cancelled when a ship unreasonably "deviates" from this course, for example by extending a voyage or by putting in at an irregular port, and the shipowner forfeits the protection of clauses of exception which might otherwise have protected him from his common law insurer's liability to cargo. See Gilmore & Black, supra Note 8, § 2–6, at 59–60. This practice, properly qualified, see id. § 3–41, makes good sense, since insurance rates are computed on the basis of the implied course, and deviations in the course increasing the anticipated risk make the insurer's calculations meaningless. Arnould, supra, § 14, at 26. Thus the route, so far as insurance contracts are concerned, is crucial, whether express or implied. But even here, the implied term is not inflexible. Reasonable deviations do not result in loss of insurance, at least so long as established practice is followed.... The doctrine's only relevance, therefore, is that it provides additional support for the assumption we willingly make that merchants agreeing to a voyage between two points expect that the usual and customary route between those points will be used. The doctrine provides no evidence of an allocation of the risk of the route's unavailability.

11. See Note, The Fetish of Impossibility in the Law of Contracts, 53 Colum.L.Rev. 94, 98 n. 23 (1953), suggesting that foreseeability is properly used "as a *factor* probative of assumption of the risk of impossibility." (Emphasis added.)

over, that some abnormal risk was contemplated is probative but does not necessarily establish an allocation of the risk of the contingency which actually occurs. In this case, for example, nationalization by Egypt of the Canal Corporation and formation of the Suez Users Group did not necessarily indicate that the Canal would be blocked even if a confrontation resulted.[12] The surrounding circumstances do indicate, however, a willingness by Transatlantic to assume abnormal risks, and this fact should legitimately cause us to judge the impracticability of performance by an alternative route in stricter terms than we would were the contingency unforeseen.

We turn then to the question whether occurrence of the contingency rendered performance commercially impracticable under the circumstances of this case. The goods shipped were not subject to harm from the longer, less temperate Southern route. The vessel and crew were fit to proceed around the Cape.[13] Transatlantic was no less able than the United States to purchase insurance to cover the contingency's occurrence. If anything, it is more reasonable to expect owner-operators of vessels to insure against the hazards of war. They are in the best position to calculate the cost of performance by alternative routes (and therefore to estimate the amount of insurance required), and are undoubtedly sensitive to international troubles which uniquely affect the demand for and cost of their services. The only factor operating here in appellant's favor is the added expense, allegedly $43,972.00 above and beyond the contract price of $305,842.92, of extending a 10,000 mile voyage by approximately 3,000 miles. While it may be an overstatement to say that increased cost and difficulty of performance never constitute impracticability, to justify relief there must be more of a variation between expected cost and the cost of performing by an available alternative than is present in this case, where the promisor can legitimately be presumed to have accepted some degree of abnormal risk, and where impracticability is urged on the basis of added expense alone.[14]

We conclude, therefore, as have most other courts considering related issues arising out of the Suez closure, that performance of this contract was not rendered legally impossible. Even if we agreed with appellant, its theory of relief seems untenable. When performance of a contract is

12. Sources cited in the briefs indicate formation of the Suez Canal Users Association on October 1, 1956, was viewed in some quarters as an implied threat of force. See N.Y. Times, Oct. 2, 1956, p. 1, col. 1, noting, on the day the charter in this case was executed, that "Britain has declared her freedom to use force as a last resort if peaceful methods fail to achieve a satisfactory settlement." Secretary of State Dulles was able, however, to view the statement as evidence of the canal users' "dedication to a just and peaceful solution." The Suez Problem 369–370 (Department of State Pub. 1956).

13. The issue of impracticability should no doubt be "an objective determination of whether the promise can reasonably be performed rather than a subjective inquiry into the promisor's capability of performing as agreed." Symposium, The Uniform Commercial Code and Contract Law: Some Selected Problems, 105 U.Pa.L.Rev. 836, 880, 887 (1957). Dealers should not be excused because of less than normal capabilities. But if both parties are aware of a dealer's limited capabilities, no objective determination would be complete without taking into account this fact.

14. See Uniform Commercial Code § 2–615, comment 4: "Increased cost alone does not excuse performance unless the rise in cost is due to some unforeseen contingency which alters the essential nature of the performance." See also 6 Corbin, supra, § 1333; 6 Williston, supra, § 1952, at 5468.

deemed impossible it is a nullity. In the case of a charter party involving carriage of goods, the carrier may return to an appropriate port and unload its cargo, The Malcolm Baxter, Jr., 277 U.S. 323 (1928), subject of course to required steps to minimize damages. If the performance rendered has value, recovery in *quantum meruit* for the entire performance is proper. But here Transatlantic has collected its contract price, and now seeks *quantum meruit* relief for the additional expense of the trip around the Cape. If the contract is a nullity, Transatlantic's theory of relief should have been *quantum meruit* for the entire trip, rather than only for the extra expense. Transatlantic attempts to take its profit on the contract, and then force the Government to absorb the cost of the additional voyage.[15] When impracticability without fault occurs, the law seeks an equitable solution, see 6 Corbin, supra, § 1321, and *quantum meruit* is one of its potent devices to achieve this end. There is no interest in casting the entire burden of commercial disaster on one party in order to preserve the other's profit. Apparently the contract price in this case was advantageous enough to deter appellant from taking a stance on damages consistent with its theory of liability. In any event, there is no basis for relief.

NOTES

(1) *Unexpected Events.* "First, a contingency . . . must have occurred." So said the court in stating three requirements for an excuse by reason of impossibility. A seller that wants to be excused from delivering goods is unlikely to meet even this first requirement simply by showing that its costs of producing the goods has spiked upward. On inquiry, however, it may be possible to identify an unexpected event underlying the increase of cost that is more likely to count as a contingency—"something unexpected"—than higher cost. If, for example, the seller is a miller and supplier of lumber, and has encountered unusual cost in buying timber, it may be possible to attribute the added cost to new environmental regulations, to a sharp upswing in construction, or to the coincidence of vast forest fires. With respect to a lumber-sale contract, which of these events is the most likely to count as a contingency? As to which is the risk most likely have been allocated—"either by agreement or by custom"—to the seller?

(2) *Impracticability and Risk.* In response to an invitation from the Federal Reserve Board, the Wegematic Corporation submitted the winning proposal for a new computing system, which Wegematic described as "a truly revolutionary system utilizing all of the latest technical advances." Delivery was to be a year later. After delays of nearly four months, Wegematic finally announced that it was "impracticable to deliver the . . . Computing System at this time." After another year, the Board succeeded in procuring comparable equipment elsewhere. When sued by the United States, Wegematic argued that it was excused because it was unable to achieve the revolutionary breakthrough that it had anticipated because of "basic engineering difficulties" that would have taken up to two years and a million and a half dollars to correct, with success likely but not certain. The United States prevailed. (In *Transatlantic—Financing* the court cited the decision in its footnote 3.)

15. The argument that the Uniform Commercial Code requires the buyer to pay the additional cost of performance by a commercially reasonable substitute was advanced and rejected in Symposium, supra Note 13, 105 U.Pa.L.Rev. at 884 n. 205. In Dillon v. United States, 156 F.Supp. 719, 140 Ct.Cl. 508 (1957), relief was afforded for some of the cost of delivering hay from a commercially unreasonable distance, but the suit was one in which the plaintiff had suffered losses far in excess of the relief given.

Krell v. Henry.

In the Court of Appeal.
1903 July 13, 14, 15; Aug. 11
[1903] 2 K.B. 740

*740 Krell v. Henry.

Vaughan Williams L.J., Romer L.J. and Stirling L.J.

1903 July 13, 14, 15; Aug. 11.

Contract--Impossibility of Performance--Implied Condition--Necessary Inference--Surrounding Circumstances--Substance of Contract--Coronation Procession--Inference that Procession would pass.

By a contract in writing of June 20, 1902, the defendant agreed to hire from the plaintiff a flat in Pall Mall for June 26 and 27, on which days it had been announced that the coronation processions would take place and pass along Pall Mall. The contract contained no express reference to the coronation processions, or to any other purpose for which the flat was taken. A deposit was paid when the contract was entered into. As the processions did not take place on the days originally fixed, the defendant declined to pay the balance of the agreed rent:--

Held, (affirming the decision of Darling J.), from necessary inferences drawn from surrounding circumstances, recognised by both contracting parties, that the taking place of the processions on the days originally fixed along the proclaimed route was regarded by both contracting parties as the foundation of the contract; that the words imposing on the defendant the obligation to accept and pay for the use of the flat for the days named, though general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards happened, and consequently that the plaintiff was not entitled to recover the balance of the rent fixed by the contract.

Taylor v. Caldwell, (1863) 3 B. & S. 826, discussed and applied.

APPEAL from a decision of Darling J.

The plaintiff, Paul Krell, sued the defendant, C. S. Henry, for 50l., being the balance of a sum of 75l., for which the defendant had agreed to hire a flat at 56A, Pall Mall on the days of June 26 and 27, for the purpose of viewing the processions to be held in connection with the coronation of His Majesty. The defendant denied his liability, and counter-claimed for the return of the sum of 25l., which had been paid as a deposit, on the ground that, the processions not having taken place owing to the serious illness of the King, there had been a total failure of consideration for the contract entered into by him.

The facts, which were not disputed, were as follows. The plaintiff on leaving the country in March, 1902, left instructions *741 with his solicitor to let his suite of chambers at 56A, Pall Mall on such terms and for such period (not exceeding six months) as he thought proper. On June 17, 1902, the defendant noticed an announcement in the windows of the plaintiff's flat to the effect that windows to view the coronation processions were to be let. The defendant interviewed the housekeeper on the subject, when it was pointed out to him what a good view of the processions could be obtained from the premises, and he eventually agreed with the housekeeper to take the suite for the two days in question for a sum of 75l.

On June 20 the defendant wrote the following letter to the plaintiff's solicitor:--

"I am in receipt of yours of the 18th instant, inclosing form of agreement for the suite of chambers on the third floor at 56A, Pall Mall, which I have agreed to take for the two days, the 26th and 27th instant, for the sum of 75l. For reasons given you I cannot enter into the agreement, but as arranged over the telephone I inclose herewith cheque for 25l. as deposit, and will thank you to confirm to me that I shall have the entire use of these rooms during the days (not the nights) of the 26th and 27th instant. You may rely that every care will be taken of the premises and their contents. On the 24th inst. I will pay the balance, viz., 50l., to complete the 75l. agreed upon."

On the same day the defendant received the following reply from the plaintiff's solicitor:--

"I am in receipt of your letter of to-day's date inclosing cheque for 25l. deposit on your agreeing to take Mr. Krell's chambers on the third floor at 56A, Pall Mall for the two days, the 26th and 27th June, and I confirm the agreement that you are to have the entire use of these rooms during the days (but not the nights), the balance, 50l., to be paid to me on Tuesday next the 24th instant."

The processions not having taken place on the days originally appointed, namely, June 26 and 27, the defendant declined to pay the balance of 50l. alleged to be due from him under the contract in writing of June 20 constituted by the above two letters. Hence the present action.

*742 Darling J., on August 11, 1902, held, upon the authority of Taylor v. Caldwell [FN1] and The Moorcock [FN2], that there was an implied condition in the contract that the procession should take place, and gave judgment for the defendant on the claim and counter-claim.

FN1 3 B. & S. 826.

FN2 (1889) 14 P. D. 64.

The plaintiff appealed.

Spencer Bower, K.C., and Holman Gregory, for the plaintiff. In the contract nothing is said about the coronation procession, but it is admitted that both parties expected that there would be a procession, and that the price to be paid for the rooms was fixed with reference to the expected procession. Darling J. held that both the claim and the counter-claim were governed by Taylor v. Caldwell [FN3], and that there was an implied term in the contract that the procession should take place. It is submitted that the learned judge was wrong. If he was

right, the result will be that in every case of this kind an unremunerated promisor will be in effect an insurer of the hopes and expectations of the promisee.

FN3 3 B. & S. 826.

Taylor v. Caldwell [FN4] purports to be founded on two passages in the Digest. But other passages in the Digest are more directly in point, and shew that the implied condition is that there shall not be a physical extinction of the subject-matter of the contract.

FN4 3 B. & S. 826.

[VAUGHAN WILLIAMS L.J. The English cases have extended the doctrine of the Digest.]

The limits of the extension are -- (1.) the not coming into being of a thing which was not in existence at the date of the contract; (2.) the case of a thing, e.g., a ship, or a person in a contract for personal service, being incapacitated from doing the work intended. In order that the person who has contracted to pay the price should be excused from doing so, there must be (1.) no default on his part; (2.) either the physical extinction or the not coming into existence of the subject-matter of the contract; (3.) the performance of the contract must have been thereby rendered impossible.

In the present case there has been no default on the part of *743 the defendant. But there has been no physical extinction of the subject-matter, and the performance of the contract was quite possible. Rule 1, laid down in Taylor v. Caldwell [FN5], and not rule 3, is the rule that regulates this case. Rule 1 is directly in the plaintiff's favour, for here the contract was positive and absolute. In that case the music hall which was the subject of the contract had been burnt down, so that performance of the contract by either party had become impossible.

FN5 3 B. & S. at p. 833.

[VAUGHAN WILLIAMS L.J. referred to Wright v. Hall. [FN6]]

FN6 (1858) E. B. & E. 746.

The cases which will be relied on for the defendant are all distinguishable from the present case. Appleby v. Myers [FN7], Boast v. Firth [FN8], Baily v. De Crespigny [FN9], Howell v. Coupland [FN10], and Nickoll v. Ashton [FN11] are all distinguishable from the present case, in which two of the necessary elements do not exist.

FN7 (1867) L. R. 2 C. P. 651.

FN8 (1868) L. R. 4 C. P. 1.

FN9 (1869) L. R. 4 Q. B. 180.

FN10 (1876) 1 Q. B. D. 258.

FN11 [1901] 2 K. B. 126.

There are a number of authorities in favour of the plaintiff, such as Paradine v. Jane [FN12]; Barker v. Hodgson [FN13]; Marquis of Bute v. Thompson [FN14]; Hills v. Sughrue [FN15]; Brown v. Royal Insurance Co. [FN16] These cases were all anterior to Taylor v. Caldwell. [FN17] There are other cases subsequent to Taylor v. Caldwell [FN18], such as Kennedy v. Panama, &c., Mail Co. [FN19]; In re Arthur [FN20]; The Moorcock. [FN21]

FN12 (1646) Al. 26.

FN13 (1814) 3 M. & S. 267; 15 R. R. 485.

FN14 (1844) 13 M. & W. 487.

FN15 (1846) 15 M. & W. 253.

FN16 (1859) 1 E. & E. 853.

FN17 3 B. & S. 826.

FN18 3 B. & S. 826.

FN19 (1867) L. R. 2 Q. B. 580.

FN20 (1880) 14 Ch. D. 603.

FN21 14 P. D. 64.

The real question is, What was the position of the parties on June 20, and what was the contract then entered into between them? The right possessed by the plaintiff on that day was the right of looking out of the window of the room, with the opportunity of seeing the procession from that window; the only sale to the defendant was of such right as the plaintiff had, and that was all that the plaintiff was parting with by the contract. There was, of course, the risk that the procession, *744 the anticipation of which gave the room a marketable value, might, from some cause or other, never take place; but that risk passed to the defendant by the contract. On entering into the contract with the defendant the plaintiff put it out of his power to let the room to any one else: he passed the right and the risk at the same time. No implied condition can be imported into the contract that the object of it shall be attained. There can be no implied condition that the defendant shall be placed in the actual position of seeing the procession. This case is closely analogous to that of London Founders' Association, Limited v. Clarke [FN22], where it was held that in a contract for the sale of shares in a company there was no implied covenant that the purchaser should be put into the status of a

shareholder by registration. So in Turner v. Goldsmith [FN23], where the defendant contracted to employ the plaintiff for a fixed term as agent in a business which he, the defendant, ultimately abandoned before the expiration of the term, it was held that there was no implied condition for the continued existence of the business, and accordingly the plaintiff was held entitled to damages for breach of contract. And that was so although part of the res had perished; here no part of the res had perished. The rule is that the Court will not imply any condition in a contract except in case of absolute necessity: Hamlyn v. Wood. [FN24] No doubt, under the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 7, where the specific goods, the subject of the contract, perish, the contract is gone; but this is not a case of that kind. And s. 14 enacts that, unless specified, no implied warranty or condition as to the quality or fitness of the goods supplied under a contract shall be imported. Ashmore v. Cox [FN25] is an authority in favour of the plaintiff, for it was there held that a buyer under a contract took the risk of the performance of the contract being rendered impossible by unforeseen circumstances.

FN22 (1888) 20 Q. B. D. 576, 579, 580, 582.

FN23 [1891] 1 Q. B. 544, 548, 551.

FN24 [1891] 2 Q. B. 488, 491-2.

FN25 [1899] 1 Q. B. 436, 441.

Blakeley v. Muller [FN26] is also in the plaintiff's favour to the extent of the counter-claim.

FN26 (1903) 88 L. T. 90; 67 J. P. 51; post, p. 760 (note).

*745 [Duke, K.C. The defendant abandons his counter-claim for 25l., so that the sole question is as to his liability for the 50l.]

Upon the main question, then, it is submitted that both the decision in Blakeley v. Muller [FN27] and of Darling J. in the present case are opposed to the principle of Taylor v. Caldwell. [FN28] The contract here is absolute, and the defendant has not, as he might have done, guarded himself against the risk by suitable words.

FN27 88 L. T. 90; 67 J. P. 51.

FN28 3 B. & S. 826.

Then, if it is said that this was a mere licence to use the room and therefore revocable as not being under seal, it has now been decided that even if such a licence is revoked an action is still maintainable for breach of contract: Kerrison v. Smith. [FN29]

FN29 [1897] 2 Q. B. 445.

In conclusion it is submitted that the Court cannot imply an express condition that the procession should pass. Nothing should be implied beyond what was necessary to give to the contract that efficacy which the parties intended at the time. There is no such necessity here; in fact, the inference is the other way, for money was paid before the days specified; which shews that the passing of the procession did not really constitute the basis of the contract, except in a popular sense. The truth is that each party had an expectation, no doubt; but the position is simply this: one says, "Will you take the room?" and the other says, "Yes." That is all. The contract did nothing more than give the defendant the opportunity of seeing whatever might be going on upon the days mentioned.

Duke, K.C., and Ricardo, for the defendant. The question is, What was the bargain? The defendant contends that it was a bargain with an implied condition that the premises taken were premises in front of which a certain act of State would take place by Royal Proclamation. A particular character was thus impressed upon the premises; and when that character ceased to be impressed upon them the contract was at an end. It is through nobody's fault, but through an unforeseen misfortune that the premises lose that character. The price agreed to be paid must be regarded: it is equivalent to *746 many thousands a year. What explanation can be given of that, except that it was agreed to be paid for the purpose of enabling the defendant to see the procession? It was the absolute assumption of both parties when entering into the contract that the procession would pass.

The principle of Taylor v. Caldwell [FN30] - namely, that a contract for the sale of a particular thing must not be construed as a positive contract, but as subject to an implied condition that, when the time comes for fulfilment, the specified thing continues to exist - exactly applies. The certainty of the coronation and consequent procession taking place was the basis of this contract. Both parties bargained upon the happening of a certain event the occurrence of which gave the premises a special character with a corresponding value to the defendant; but as the condition failed the premises lost their adventitious value. There has been such a change in the character of the premises which the plaintiff agreed the defendant should occupy as to deprive them of their value. When the premises become unfit for the purpose for which they were taken the bargain is off: Taylor v. Caldwell [FN31], the principle of which case was adopted by the Court of Appeal in Nickoll v. Ashton. [FN32] What was in contemplation here was not that the defendant should merely go and sit in the room, but that he should see a procession which both parties regarded as an inevitable event. There was an implied warranty or condition founded on the presumed intention of the parties, and upon reason: The Moorcock. [FN33] No doubt the observations of the Court in that case were addressed to a totally different subject-matter, but the principle laid down was exactly as stated in Taylor v. Caldwell [FN34] and Nickoll v. Ashton. [FN35] In Hamlyn v. Wood [FN36] it was held that in a contract there must be a reasonable implication in order to give the transaction such efficacy as both parties intended it to have, and that without such implication the consideration would fail. In the case of a demise, collateral bargains do not arise; but here *747 there is an agreement, and what has to be done is to ascertain the meaning and intention the parties had in entering into it.

FN30 3 B. & S. 826.

FN31 3 B. & S. at p. 832.

FN32 [1901] 2 K. B. 126, 137.

FN33 14 P. D. 64, 68.

FN34 3 B. & S. 826.

FN35 [1901] 2 K. B. 126.

FN36 [1891] 2 Q. B. 488.

[STIRLING L.J. In Appleby v. Myers [FN37] there was a contract to supply certain machinery to a building, but before the completion of the contract the building was burnt down; and it was held that both parties were excused from performance of the contract.]

FN37 L. R. 2 C. P. 651.

In that case the contract had been partly performed; but the defendant's case is stronger than that. When, as here, the contract is wholly executory and the subject-matter fails, the contract is at an end.

[STIRLING L.J. In Baily v. De Crespigny [FN38], where the performance of a covenant was rendered impossible by an Act of Parliament, it was held that the covenantor was discharged.

FN38 L. R. 4 Q. B. 180.

VAUGHAN WILLIAMS L.J. In Howell v. Coupland [FN39] the contract was held to be subject to an implied condition that the parties should be excused if performance became impossible through the perishing of the subject-matter.]

FN39 1 Q. B. D. 258.

That applies here: it is impossible for the plaintiff to give the defendant that which he bargained for, and, therefore, there is a total failure of consideration.

To sum up, the basis of the contract is that there would be a procession - that is to say, it is a contract based upon a certain thing coming into existence: there is a condition precedent that there shall be a procession. But for the mutual expectation of a procession upon the days mentioned there would have been no contract whatever. The basis of the contract was also the continuance of a thing in a certain condition; for on June 20 the rooms were capable of being described as a place from which to view a procession on two particular days; whereas when those days arrived the rooms were no longer capable of being so described.

Holman Gregory replied.

Cur. adv. vult.

Aug. 11. VAUGHAN WILLIAMS L.J.

read the following written judgment:--

The real question in this case is the extent *748 of the application in English law of the principle of the Roman law which has been adopted and acted on in many English decisions, and notably in the case of Taylor v. Caldwell. [FN40] That case at least makes it clear that "where, from the nature of the contract, it appears that the parties must from the beginning have known that it could not be fulfilled unless, when the time for the fulfilment of the contract arrived, some particular specified thing continued to exist, so that when entering into the contract they must have contemplated such continued existence as the foundation of what was to be done; there, in the absence of any express or implied warranty that the thing shall exist, the contract is not to be considered a positive contract, but as subject to an implied condition that the parties shall be excused in case, before breach, performance becomes impossible from the perishing of the thing without default of the contractor." Thus far it is clear that the principle of the Roman law has been introduced into the English law. The doubt in the present case arises as to how far this principle extends. The Roman law dealt with obligationes de certo corpore. Whatever may have been the limits of the Roman law, the case of Nickoll v. Ashton [FN41] makes it plain that the English law applies the principle not only to cases where the performance of the contract becomes impossible by the cessation of existence of the thing which is the subject-matter of the contract, but also to cases where the event which renders the contract incapable of performance is the cessation or non-existence of an express condition or state of things, going to the root of the contract, and essential to its performance. It is said, on the one side, that the specified thing, state of things, or condition the continued existence of which is necessary for the fulfilment of the contract, so that the parties entering into the contract must have contemplated the continued existence of that thing, condition, or state of things as the foundation of what was to be done under the contract, is limited to things which are either the subject-matter of the contract or a condition or state of things, present or anticipated, which is expresssly *749 mentioned in the contract. But, on the other side, it is said that the condition or state of things need not be expressly specified, but that it is sufficient if that condition or state of things clearly appears by extrinsic evidence to have been assumed by the parties to be the foundation or basis of the contract, and the event which causes the impossibility is of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made. In such a case the contracting parties will not be held bound by the general words which, though large enough to include, were not used with reference to a possibility of a particular event rendering performance of the contract impossible. I do not think that the principle of the civil law as introduced into the English law is limited to cases in which the event causing the impossibility of performance is the destruction or non-existence of some thing which is the subject-matter of the contract or of some condition or state of things expressly specified as a condition of it. I think that you first have to ascertain, not necessarily from the terms of the contract, but, if required, from necessary inferences, drawn from surrounding circumstances recognised by both contracting parties, what is the substance of the contract, and then to ask the question whether that substantial

contract needs for its foundation the assumption of the existence of a particular state of things. If it does, this will limit the operation of the general words, and in such case, if the contract becomes impossible of performance by reason of the non-existence of the state of things assumed by both contracting parties as the foundation of the contract, there will be no breach of the contract thus limited. Now what are the facts of the present case? The contract is contained in two letters of June 20 which passed between the defendant and the plaintiff's agent, Mr. Cecil Bisgood. These letters do not mention the coronation, but speak merely of the taking of Mr. Krell's chambers, or, rather, of the use of them, in the daytime of June 26 and 27, for the sum of 75l., 25l. then paid, balance 50l. to be paid on the 24th. But the affidavits, which by agreement between the parties are to be taken as stating the facts of the case, shew that the plaintiff exhibited on his *750 premises, third floor, 56A, Pall Mall, an announcement to the effect that windows to view the Royal coronation procession were to be let, and that the defendant was induced by that announcement to apply to the housekeeper on the premises, who said that the owner was willing to let the suite of rooms for the purpose of seeing the Royal procession for both days, but not nights, of June 26 and 27. In my judgment the use of the rooms was let and taken for the purpose of seeing the Royal procession. It was not a demise of the rooms, or even an agreement to let and take the rooms. It is a licence to use rooms for a particular purpose and none other. And in my judgment the taking place of those processions on the days proclaimed along the proclaimed route, which passed 56A, Pall Mall, was regarded by both contracting parties as the foundation of the contract; and I think that it cannot reasonably be supposed to have been in the contemplation of the contracting parties, when the contract was made, that the coronation would not be held on the proclaimed days, or the processions not take place on those days along the proclaimed route; and I think that the words imposing on the defendant the obligation to accept and pay for the use of the rooms for the named days, although general and unconditional, were not used with reference to the possibility of the particular contingency which afterwards occurred. It was suggested in the course of the argument that if the occurrence, on the proclaimed days, of the coronation and the procession in this case were the foundation of the contract, and if the general words are thereby limited or qualified, so that in the event of the non-occurrence of the coronation and procession along the proclaimed route they would discharge both parties from further performance of the contract, it would follow that if a cabman was engaged to take some one to Epsom on Derby Day at a suitable enhanced price for such a journey, say 10l., both parties to the contract would be discharged in the contingency of the race at Epsom for some reason becoming impossible; but I do not think this follows, for I do not think that in the cab case the happening of the race would be the foundation of the contract. No doubt the purpose of the engager would be to go to see the Derby, and the price would be proportionately high; but the cab had *751 no special qualifications for the purpose which led to the selection of the cab for this particular occasion. Any other cab would have done as well. Moreover, I think that, under the cab contract, the hirer, even if the race went off, could have said, "Drive me to Epsom; I will pay you the agreed sum; you have nothing to do with the purpose for which I hired the cab," and that if the cabman refused he would have been guilty of a breach of contract, there being nothing to qualify his promise to drive the hirer to Epsom on a particular day. Whereas in the case of the coronation, there is not merely the purpose of the hirer to see the coronation procession, but it is the coronation procession and the relative

position of the rooms which is the basis of the contract as much for the lessor as the hirer; and I think that if the King, before the coronation day and after the contract, had died, the hirer could not have insisted on having the rooms on the days named. It could not in the cab case be reasonably said that seeing the Derby race was the foundation of the contract, as it was of the licence in this case. Whereas in the present case, where the rooms were offered and taken, by reason of their peculiar suitability from the position of the rooms for a view of the coronation procession, surely the view of the coronation procession was the foundation of the contract, which is a very different thing from the purpose of the man who engaged the cab - namely, to see the race - being held to be the foundation of the contract. Each case must be judged by its own circumstances. In each case one must ask oneself, first, what, having regard to all the circumstances, was the foundation of the contract? Secondly, was the performance of the contract prevented? Thirdly, was the event which prevented the performance of the contract of such a character that it cannot reasonably be said to have been in the contemplation of the parties at the date of the contract? If all these questions are answered in the affirmative (as I think they should be in this case), I think both parties are discharged from further performance of the contract. I think that the coronation procession was the foundation of this contract, and that the non-happening of it prevented the performance of the contract; and, secondly, I think that the *752 non-happening of the procession, to use the words of Sir James Hannen in Baily v. De Crespigny [FN42], was an event "of such a character that it cannot reasonably be supposed to have been in the contemplation of the contracting parties when the contract was made, and that they are not to be held bound by general words which, though large enough to include, were not used with reference to the possibility of the particular contingency which afterwards happened." The test seems to be whether the event which causes the impossibility was or might have been anticipated and guarded against. It seems difficult to say, in a case where both parties anticipate the happening of an event, which anticipation is the foundation of the contract, that either party must be taken to have anticipated, and ought to have guarded against, the event which prevented the performance of the contract. In both Jackson v. Union Marine Insurance Co. [FN43] and Nickoll v. Ashton [FN44] the parties might have anticipated as a possibility that perils of the sea might delay the ship and frustrate the commercial venture: in the former case the carriage of the goods to effect which the charterparty was entered into; in the latter case the sale of the goods which were to be shipped on the steamship which was delayed. But the Court held in the former case that the basis of the contract was that the ship would arrive in time to carry out the contemplated commercial venture, and in the latter that the steamship would arrive in time for the loading of the goods the subject of the sale. I wish to observe that cases of this sort are very different from cases where a contract or warranty or representation is implied, such as was implied in The Moorcock [FN45], and refused to be implied in Hamlyn v. Wood. [FN46] But The Moorcock [FN47] is of importance in the present case as shewing that whatever is the suggested implication - be it condition, as in this case, or warranty or representation - one must, in judging whether the implication ought to be made, look not only at the words of the contract, but also at the surrounding facts and the knowledge of the parties of those facts. There seems to me to be ample *753 authority for this proposition. Thus in Jackson v. Union Marine Insurance Co. [FN48], in the Common Pleas, the question whether the object of the voyage had been frustrated by the delay of the

ship was left as a question of fact to the jury, although there was nothing in the charterparty defining the time within which the charterers were to supply the cargo of iron rails for San Francisco, and nothing on the face of the charterparty to indicate the importance of time in the venture; and that was a case in which, as Bramwell B. points out in his judgment at p. 148, Taylor v. Caldwell [FN49] was a strong authority to support the conclusion arrived at in the judgment - that the ship not arriving in time for the voyage contemplated, but at such time as to frustrate the commercial venture, was not only a breach of the contract but discharged the charterer, though he had such an excuse that no action would lie. And, again, in Harris v. Dreesman [FN50] the vessel had to be loaded, as no particular time was mentioned, within a reasonable time; and, in judging of a reasonable time, the Court approved of evidence being given that the defendants, the charterers, to the knowledge of the plaintiffs, had no control over the colliery from which both parties knew that the coal was to come; and that, although all that was said in the charterparty was that the vessel should proceed to Spital Tongue's Spout (the spout of the Spital Tongue's Colliery), and there take on board from the freighters. a full and complete cargo of coals, and five tons of coke, and although there was no evidence to prove any custom in the port as to loading vessels in turn. Again it was held in Mumford v. Gething [FN51] that, in construing a written contract of service under which A. was to enter the employ of B., oral evidence is admissible to shew in what capacity A. was to serve B. See also Price v. Mouat. [FN52] The rule seems to be that which is laid down in Taylor on Evidence, vol. ii. s. 1082: "It may be laid down as a broad and distinct rule of law that extrinsic evidence of every material fact which will enable the Court to ascertain the nature and qualities of the subject-matter of the instrument, or, in other words, to identify the *754 persons and things to which the instrument refers, must of necessity be received." And Lord Campbell in his judgment says: "I am of opinion that, when there is a contract for the sale of a specific subject-matter, oral evidence may be received, for the purpose of shewing what that subject-matter was, of every fact within the knowledge of the parties before and at the time of the contract." See per Campbell C.J., Macdonald v. Longbottom. [FN53] It seems to me that the language of Willes J. in Lloyd v. Guibert [FN54] points in the same direction. I myself am clearly of opinion that in this case, where we have to ask ourselves whether the object of the contract was frustrated by the non-happening of the coronation and its procession on the days proclaimed, parol evidence is admissible to shew that the subject of the contract was rooms to view the coronation procession, and was so to the knowledge of both parties. When once this is established, I see no difficulty whatever in the case. It is not essential to the application of the principle of Taylor v. Caldwell [FN55] that the direct subject of the contract should perish or fail to be in existence at the date of performance of the contract. It is sufficient if a state of things or condition expressed in the contract and essential to its performance perishes or fails to be in existence at that time. In the present case the condition which fails and prevents the achievement of that which was, in the contemplation of both parties, the foundation of the contract, is not expressly mentioned either as a condition of the contract or the purpose of it; but I think for the reasons which I have given that the principle of Taylor v. Caldwell [FN56] ought to be applied. This disposes of the plaintiff's claim for 50l. unpaid balance of the price agreed to be paid for the use of the rooms. The defendant at one time set up a cross-claim for the return of the 25l. he paid at the date of the contract. As that claim is now withdrawn it is unnecessary to say anything about it.

I have only to add that the facts of this case do not bring it within the principle laid down in Stubbs v. Holywell Ry. Co. [FN57]; that in the case of contracts falling directly within the rule of *755 Taylor v. Caldwell [FN58] the subsequent impossibility does not affect rights already acquired, because the defendant had the whole of June 24 to pay the balance, and the public announcement that the coronation and processions would not take place on the proclaimed days was made early on the morning of the 24th, and no cause of action could accrue till the end of that day. I think this appeal ought to be dismissed.

FN40 3 B. & S. 826.

FN41 [1901] 2 K. B. 126.

FN42 L. R. 4 Q. B. 185.

FN43 (1873) L. R. 8 C. P. 572.

FN44 [1901] 2 K. B. 126.

FN45 14 P. D. 64.

FN46 [1891] 2 Q. B. 488.

FN47 14 P. D. 64.

FN48 L. R. 8 C. P. 572; (1874) 10 C. P. 125; 42 L. J. (C.P.) 284.

FN49 3 B. & S. 826.

FN50 (1854) 23 L. J. (Ex.) 210.

FN51 (1859) 7 C. B. (N.S.) 305.

FN52 (1862) 11 C. B. (N.S.) 508.

FN53 (1859) 1 E. & E. 977, at p. 983.

FN54 (1865) 35 L. J. (Q.B.) 74, 75.

FN55 3 B. & S. 826.

FN56 3 B. & S. 826.

FN57 (1867) L. R. 2 Ex. 311.

FN58 3 B. & S. 826.

ROMER L.J.

With some doubt I have also come to the conclusion that this case is governed by the principle on which Taylor v. Caldwell [FN59] was decided, and accordingly that the appeal must be dismissed. The doubt I have felt was whether the parties to the contract now before us could be said, under the circumstances, not to have had at all in their contemplation the risk that for some reason or other the coronation processions might not take place on the days fixed, or, if the processions took place, might not pass so as to be capable of being viewed from the rooms mentioned in the contract; and whether, under this contract, that risk was not undertaken by the defendant. But on the question of fact as to what was in the contemplation of the parties at the time, I do not think it right to differ from the conclusion arrived at by Vaughan Williams L.J., and (as I gather) also arrived at by my brother Stirling. This being so, I concur in the conclusions arrived at by Vaughan Williams L.J. in his judgment, and I do not desire to add anything to what he has said so fully and completely.

FN59 3 B. & S. 826.

STIRLING L.J.

said he had had an opportunity of reading the judgment delivered by Vaughan Williams L.J., with which he entirely agreed. Though the case was one of very great difficulty, he thought it came within the principle of Taylor v. Caldwell. [FN60]

FN60 3 B. & S. 826.

Appeal dismissed. (W. C. D.)

the latter to complete the contract and had performed himself. The question, therefore, in Hohfeldian language, was whether the executor, who unquestionably had a power vis-a-vis the building contractor to change a primary obligation into a secondary one by breaking the contract, was under a duty vis-a-vis the estate to exercise the power. The court, though recognizing that the executor is under a duty to the estate to come to a friendly arrangement with the other contracting party beneficial to the estate should the opportunity present itself, correctly decided that he is under no duty to commit a wrongful act, i.e., a breach of contract. The decision in favor of the executor makes eminent good sense, otherwise his duties would be far too onerous, 55 L.Q. Rev. 1 (1939). On the distinction between rights and duties on the one hand and powers and liabilities on the other, see W. N. Hohfeld, Fundamental Legal Conceptions as Applied in Judicial Reasoning (1923); Corbin, Legal Analysis and Terminology, 29 Yale L.J. 163 (1919); Cook, *supra*, at 346-351; J. Stone, Legal Systems and Lawyers' Reasonings 137 (1964). For the so-called right to break a contract, see further Chapter 10, Section 2. For an economist's reinterpretation of the Holmesian view, see R. Posner, Economic Analysis of Law 88 et seq. (1977). For a strong defense of the usefulness of specific performance, see Schwartz, The Case for Specific Performance, 89 Yale L.J. 271 (1979).

HADLEY v. BAXENDALE

9 Ex. 341, 156 Eng. Rep. 145 (1854)

At the trial before Crompton, J., at the last Gloucester Assizes, it appeared that the plaintiffs carried on an extensive business as millers at Gloucester; and that, on the 11th of May, their mill was stopped by a breakage of the crank shaft by which the mill was worked. The steam-engine was manufactured by Messrs. Joyce & Co., the engineers, at Greenwich, and it became necessary to send the shaft as a pattern for a new one to Greenwich. The fracture was discovered on the 12th, and on the 13th the plaintiffs sent one of their servants to the office of the defendants, who are the well-known carriers trading under the name of Pickford & Co., for the purpose of having the shaft carried to Greenwich. The plaintiffs' servant told the clerk that the mill was stopped, and that the shaft must be sent immediately; and in answer to the inquiry when the shaft would be taken, the answer was, that if it was sent up by twelve o'clock any day, it would be delivered at Greenwich the following day. On the following day the shaft was taken by the defendants, before noon, for the purpose of being conveyed to Greenwich, and the sum of 2*l.* 4*s.* was paid for its carriage for the whole distance; at the same time the defendants' clerk was told that a special entry, if required, should be made to hasten its delivery. The delivery of the shaft at Greenwich was delayed by

some neglect; and the consequence was, that the plaintiffs did not receive the new shaft for several days after they would otherwise have done, and the working of their mill was thereby delayed, and they thereby lost the profits they would otherwise have received.

On the part of the defendants, it was objected that these damages were too remote, and that the defendants were not liable with respect to them. The learned Judge left the case generally to the jury, who found a verdict with 25*l.* damages beyond the amount paid into Court.

Whateley, in last Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection. . . .

ALDERSON, B. — We think that there ought to be a new trial in this case; but, in so doing, we deem it to be expedient and necessary to state explicitly the rule which the Judge, at the next trial, ought, in our opinion, to direct the jury to be governed by when they estimate the damages.

It is, indeed, of the last importance that we should do this; for, if the jury are left without any definite rule to guide them, it will in such cases as these, manifestly lead to the greatest injustice. The Courts have done this on several occasions; and, in Blake v. Midland Railway Company, 21 L.J., Q.B., 237, the Court granted a new trial on this very ground, that the rule had not been definitely laid down to the jury by the learned Judge at Nisi Prius.

"There are certain established rules," this Court says, in Alder v. Keighley, 15 M. & W. 117, "according to which the jury ought to find." And the Court, in that case, adds: "and here there is a clear rule, that the amount which would have been received if the contract had been kept, is the measure of damages if the contract is broken."

Now we think the proper rule in such a case as the present is this: — Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either arising naturally, i.e., according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiffs to the defendants, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if these special circumstances were wholly unknown to the party breaking the contract, he, at the most, could only be supposed to have had in his contemplation the amount of injury which would arise generally, and in the great multitude of cases not affected by any special circumstances, from such a breach of contract. For, had the special

circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case; and of this advantage it would be very unjust to deprive them. Now the above principles are those by which we think the jury ought to be guided in estimating the damages arising out of any breach of contract. It is said, that other cases, such as breaches of contract in the non-payment of money, or in the not making a good title to land, are to be treated as exceptions from this, and as governed by a conventional rule. But as, in such cases, both parties must be supposed to be cognizant of that well-known rule, these cases may, we think, be more properly classed under the rule above enunciated as to cases under known special circumstances, because there both parties may reasonably be presumed to contemplate the estimation of the amount of damages according to the conventional rule. Now, in the present case, if we are to apply the principles above laid down, we find that the only circumstances here communicated by the plaintiffs to the defendants at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiffs were the millers of that mill. But how do these circumstances show reasonably that the profits of the mill must be stopped by an unreasonable delay in the delivery of the broken shaft by the carrier to the third person? Suppose the plaintiffs had another shaft in their possession put up or putting up at the time, and that they only wished to send back the broken shaft to the engineer who made it; it is clear that this would be quite consistent with the above circumstances, and yet the unreasonable delay in the delivery would have no effect upon the intermediate profits of the mill. Or, again, suppose that, at the time of the delivery to the carrier, the machinery of the mill had been in other respects defective, then, also, the same results would follow. Here it is true that the shaft was actually sent back to serve as a model for a new one, and that the want of a new one was the only cause of the stoppage of the mill, and that the loss of profits really arose from not sending down the new shaft in proper time, and that this arose from the delay in delivering the broken one to serve as a model. But it is obvious that, in the great multitude of cases of millers sending off broken shafts to third persons by a carrier under ordinary circumstances, such consequences would not, in all probability, have occurred; and these special circumstances were here never communicated by the plaintiffs to the defendants. It follows, therefore, that the loss of profits here cannot reasonably be considered such a consequence of the breach of contract as could have been fairly and reasonably contemplated by both the parties when they made this contract. For such loss would neither have flowed naturally from the breach of this contract in the great multitude of such cases occurring under ordinary circumstances, nor were the special circumstances, which, perhaps, would have made it a reasonable and natural consequence of such

breach of contract, communicated to or known by the defendants. The judge ought, therefore, to have told the jury that, upon the facts then before them, they ought not to take the loss of profits into consideration at all in estimating the damages. There must therefore be a new trial in this case.

Rule absolute.

NOTE

"[A]s the contract is by mutual consent, the parties themselves expressly or by implication, fix the rule by which damages are to be measured." Holmes, J., in Globe Refining Co. v. Landa Cotton Oil Co., 190 U.S. 540, 543 (1903), infra p. 1144.

The rule of Hadley v. Baxendale

> . . . by subjecting all contract claims to a test of foreseeability by the contract breaker of the loss at the time of the making of the contract, diminishes the risk of business enterprise, and the result harmonized well with the free-trade economic philosophy of the Victorian era during which our law of contracts became systematized.

C. T. McCormick, Law of Damages 566-567 (1935). For an excellent discussion of the rules in Hadley v. Baxendale, consult *The Heron II* and Victoria Laundry v. Newman Industries, pp. 1157 and 1164 *infra*.

> The scope of damage for breach of contract is much narrower than the "proximate consequence" rule which prevails in actions to recover for a tort. If we may assume that the defaulting promisor is usually an *entrepreneur*, a businessman who has undertaken a risky enterprise, the law here manifests a policy to encourage the *entrepreneur* by reducing the extent of his risk below that amount of damage which, it might be plausibly argued, the promisee has actually been caused to suffer.

Patterson, The Apportionment of Business Risks Through Legal Devices, 24 Colum. L. Rev. 335, 342 (1924). For a further discussion of the measure of damages in tort and contract, see 5 Corbin §1019. See, in general, Chapter 10.

In Hadley v. Baxendale: A Study in the Industrialization of the Law, 4 J. Legal Stud. 249 (1975), Professor Danzig offers some fascinating insights into the circumstances surrounding the case and suggests a variety of reasons for the rule, some turning on contemporary deficiencies in the substantive law and others on administrative needs of the judiciary. He further points out that however sensible the rule was for business enter-

After holding a hearing on the petition to vacate the earlier decree dispensing with the necessity for the petitioner's consent to the adoption of her son, the judge endorsed on the petition; "Denied after hearing (Wilson, J.) December 3, 1971." As a result of that endorsement, a final decree should have been entered dismissing the petition. Neither the record on appeal nor our copy of the Probate Court docket entries in the case indicates that such a decree was ever entered. Nevertheless, on December 9, 1971, the petitioner filed a claim of appeal from "a decree of the Probate Court . . . on the 3rd day of December, 1971, whereby said Court denied her Petition To Vacate Decree To Establish Consent to Adoption." Therefore, if, notwithstanding the state of the record, a final decree was entered dismissing the petition, the decree is affirmed. However, if, in fact, no such decree was entered, the parties having prosecuted this appeal as though one had been entered, a final decree shall be entered dismissing the petition and the petitioner shall have no further right of appeal therefrom.

By her petition before the single justice of this court the petitioner sought leave, under G.L. c. 210, § 11, to appeal from the decree allowing the adoption of her son so that she might raise the same question which she has since raised and litigated in the Probate Court, viz., whether her consent was essential to the validity of the adoption. The adverse decision of the Probate Court on that question having been affirmed above in this opinion, a final decree is to be entered by the single justice dismissing the petition which was the subject of the reservation and report to this court.

So ordered.

3 have been diluted further with the amendment of Section 3A. The efforts of the legislature in enacting the many amendments to the adoption consent provisions indicate that it recognizes that adoptions should be permitted when they are for the best interests of the child, and that any obstacle impeding such an adoption should be removed."

Alice SULLIVAN

v.

James H. O'CONNOR.

Supreme Judicial Court of Massachusetts, Suffolk.

Argued March 6, 1973.

Decided May 9, 1973.

Professional entertainer filed two-count declaration against plastic surgeon seeking to recover for breach of contract in respect to operation on plaintiff's nose and for malpractice. The Superior Court, Brogna, J., rendered judgment for plaintiff, and exceptions were taken. The Supreme Judicial Court, Kaplan, J., held that as damages for surgeon's breach of contract to perform two plastic surgery operations on professional entertainer's nose and to thereby enhance her beauty and improve her appearance entertainer was not confined to recovery of out-of-pocket expenditures but was entitled to recover for worsening of her condition, which involved a mental ailment, and for pain and suffering and mental distress involved in a third operation; in absence of claim for pain and suffering connected with first two operations contemplated by agreement or the whole difference in value between present and promised condition, aforementioned elements were compensable on either an expectancy or reliance basis.

Plaintiff's exceptions waived; defendant's exceptions overruled.

1. Physicians and Surgeons ⇐14(3), 18(8)

Causes of action for breach of physician's agreement to effect a cure or to bring about a given result are considered

suspect; clear proof is required before recovery for alleged breach of such an agreement is warranted.

2. Damages ⇐117

Standard measures of recovery for breach of contract include "compensatory" or "expectancy" damages, that is, an amount intended to put plaintiff in the position he would have been in if the contract had been performed, or presumably, at plaintiff's election, "restitution" damages, that is, an amount corresponding to any benefit conferred by plaintiff on defendant in performance of the contract disrupted by the defendant's breach.

3. Physicians and Surgeons ⇐18(11)

Where, by reason of an operation, a patient, seeking to recover from physician for breach of contract to effect a cure or bring about a given result, was put to more pain than he would have had to endure had the doctor performed as promised, patient should be compensated for that difference as a proper part of his expectancy recovery.

4. Contracts ⇐328(1)

It is no defense to breach of contract that the promisor acted innocently and without negligence.

5. Physicians and Surgeons ⇐18(11)

As damages for surgeon's breach of contract to perform two plastic surgery operations on professional entertainer's nose and to thereby enhance her beauty and improve her appearance entertainer was not confined to recovery of out-of-pocket expenditures but was also entitled to recover for worsening of her condition, which involved a mental ailment, and for pain and suffering and mental distress involved in a third operation; in absence of claim for pain and suffering connected with first two operations contemplated by agreement or the whole difference in value between present and promised condition, aforementioned elements were compensable on either an expectancy or reliance basis.

John F. Finnerty, Boston, for defendant.

Francis C. Newton, Jr., Boston, for plaintiff.

Before TAURO, C. J., and REARDON, QUIRICO, KAPLAN and WILKINS, JJ.

KAPLAN, Justice.

The plaintiff patient secured a jury verdict of $13,500 against the defendant surgeon for breach of contract in respect to an operation upon the plaintiff's nose. The substituted consolidated bill of exceptions presents questions about the correctness of the judge's instructions on the issue of damages.

The declaration was in two counts. In the first count, the plaintiff alleged that she, as patient, entered into a contract with the defendant, a surgeon, wherein the defendant promised to perform plastic surgery on her nose and thereby to enhance her beauty and improve her appearance; that he performed the surgery but failed to achieve the promised result; rather the result of the surgery was to disfigure and deform her nose, to cause her pain in body and mind, and to subject her to other damage and expense. The second count, based on the same transaction, was in the conventional form for malpractice, charging that the defendant had been guilty of negligence in performing the surgery. Answering, the defendant entered a general denial.

On the plaintiff's demand, the case was tried by jury. At the close of the evidence, the judge put to the jury, as special questions, the issues of liability under the two counts, and instructed them accordingly. The jury returned a verdict for the plaintiff on the contract count, and for the defendant on the negligence count. The judge then instructed the jury on the issue of damages.

As background to the instructions and the parties' exceptions, we mention certain facts as the jury could find them. The plaintiff was a professional entertainer,

and this was known to the defendant. The agreement was as alleged in the declaration. More particularly, judging from exhibits, the plaintiff's nose had been straight, but long and prominent; the defendant undertook by two operations to reduce its prominence and somewhat to shorten it, thus making it more pleasing in relation to the plaintiff's other features. Actually the plaintiff was obliged to undergo three operations, and her appearance was worsened. Her nose now had a concave line to about the midpoint, at which it became bulbous; viewed frontally, the nose from bridge to midpoint was flattened and broadened, and the two sides of the tip had lost symmetry. This configuration evidently could not be improved by further surgery. The plaintiff did not demonstrate, however, that her change of appearance had resulted in loss of employment. Payments by the plaintiff covering the defendant's fee and hospital expenses were stipulated at $622.65.

The judge instructed the jury, first, that the plaintiff was entitled to recover her out-of-pocket expenses incident to the operations. Second, she could recover the damages flowing directly, naturally, proximately, and foreseeably from the defendant's breach of promise. These would comprehend damages for any disfigurement of the plaintiff's nose—that is, any change of appearance for the worse—including the effects of the consciousness of such disfigurement on the plaintiff's mind, and in this connection the jury should consider the nature of the plaintiff's profession. Also consequent upon the defendant's breach, and compensable, were the pain and suffering involved in the third operation, but not in the first two. As there was no proof that any loss of earnings by the plaintiff resulted from the breach, that element should not enter into the calculation of damages.

By his exceptions the defendant contends that the judge erred in allowing the jury to take into account anything but the plaintiff's out-of-pocket expenses (presumably at the stipulated amount). The defendant excepted to the judge's refusal of his request for a general charge to that effect, and, more specifically, to the judge's refusal of a charge that the plaintiff could not recover for pain and suffering connected with the third operation or for impairment of the plaintiff's appearance and associated mental distress.[1]

The plaintiff on her part excepted to the judge's refusal of a request to charge that the plaintiff could recover the difference in value between the nose as promised and the nose as it appeared after the operations. However, the plaintiff in her brief expressly waives this exception and others made by her in case this court overrules the defendant's exceptions; thus she would be content to hold the jury's verdict in her favor.

We conclude that the defendant's exceptions should be overruled.

[1] It has been suggested on occasion that agreements between patients and physicians by which the physician undertakes to effect a cure or to bring about a given result should be declared unenforceable on grounds of public policy. See Guilmet v. Campbell, 385 Mich. 57, 76, 188 N.W.2d 601 (dissenting opinion). But there are many decisions recognizing and enforcing such contracts, see annotation, 43 A.L.R.3d 1221, 1225, 1229–1233, and the law of Massachusetts has treated them as valid, although we have had no decision meeting head on the contention that they should be denied legal sanction. Small v. Howard, 128 Mass. 131; Gabrunas v. Miniter, 289 Mass. 20, 193 N.E. 551; Forman v. Wolfson, 327 Mass. 341, 98 N.E.2d 615. These causes of action are, however, considered a little suspect, and thus we find courts straining sometimes to read the pleadings as sounding only in tort for negligence, and not in contract for breach of promise,

1. The defendant also excepted to the judge's refusal to direct a verdict in his favor, but this exception is not pressed and could not be sustained.

despite sedulous efforts by the pleaders to pursue the latter theory. See Gault v. Sideman, 42 Ill.App.2d 96, 191 N.E.2d 436; annotation, *supra*, at 1225, 1238–1244.

It is not hard to see why the courts should be unenthusiastic or skeptical about the contract theory. Considering the uncertainties of medical science and the variations in the physical and psychological conditions of individual patients, doctors can seldom in good faith promise specific results. Therefore it is unlikely that physicians of even average integrity will in fact make such promises. Statements of opinion by the physician with some optimistic coloring are a different thing, and may indeed have therapeutic value. But patients may transform such statements into firm promises in their own minds, especially when they have been disappointed in the event, and testify in that sense to sympathetic juries.[2] If actions for breach of promise can be readily maintained, doctors, so it is said, will be frightened into practising "defensive medicine." On the other hand, if these actions were outlawed, leaving only the possibility of suits for malpractice, there is fear that the public might be exposed to the enticements of charlatans, and confidence in the profession might ultimately be shaken. See Miller, The Contractual Liability of Physicians and Surgeons, 1953 Wash.L.Q. 413, 416–423. The law has taken the middle of the road position of allowing actions based on alleged contract, but insisting on clear proof. Instructions to the jury may well stress this requirement and point to tests of truth, such as the complexity or difficulty of an operation as bearing on the probability that a given result was promised. See annotation, 43 A.L.R.3d 1225, 1225–1227.

[2–4] If an action on the basis of contract is allowed, we have next the question of the measure of damages to be applied where liability is found. Some cases have taken the simple view that the promise by the physician is to be treated like an ordinary commercial promise, and accordingly that the successful plaintiff is entitled to a standard measure of recovery for breach of contract—"compensatory" ("expectancy") damages, an amount intended to put the plaintiff in the position he would be in if the contract had been performed, or, presumably, at the plaintiff's election, "restitution" damages, an amount corresponding to any benefit conferred by the plaintiff upon the defendant in the performance of the contract disrupted by the defendant's breach. See Restatement: Contracts § 329 and comment a, §§ 347, 384(1). Thus in Hawkins v. McGee, 84 N.H. 114, 146 A. 641, the defendant doctor was taken to have promised the plaintiff to convert his damaged hand by means of an operation into a good or perfect hand, but the doctor so operated as to damage the hand still further. The court, following the usual expectancy formula, would have asked the jury to estimate and award to the plaintiff the difference between the value of a good or perfect hand, as promised, and the value of the hand after the operation. (The same formula would apply, although the dollar result would be less, if the operation had neither worsened nor improved the condition of the hand.) If the plaintiff had not yet paid the doctor his fee, that amount would be deducted from the recovery. There could be no recovery for the pain and suffering of the operation, since that detriment would have been incurred even if the operation had been successful; one can say that this detriment was not "caused" by the breach. But where the plaintiff by reason of the operation was put to more pain that he would have had to endure, had the doctor

2. Judicial skepticism about whether a promise was in fact made derives also from the possibility that the truth has been tortured to give the plaintiff the advantage of the longer period of limitations sometimes available for actions on contract as distinguished from those in tort or for malpractice. See Lillich, The Malpractice Statute of Limitations in New York and Other Jurisdictions, 47 Cornell L.Q. 339; annotation, 80 A.L.R. 2d 368.

performed as promised, he should be compensated for that difference as a proper part of his expectancy recovery. It may be noted that on an alternative count for malpractice the plaintiff in the *Hawkins* case had been nonsuited; but on ordinary principles this could not affect the contract claim, for it is hardly a defence to a breach of contract that the promisor acted innocently and without negligence. The New Hampshire court further refined the *Hawkins* analysis in McQuaid v. Michou, 85 N.H. 299, 157 A. 881, all in the direction of treating the patient-physician cases on the ordinary footing of expectancy. See McGee v. United States Fid. & Guar. Co., 53 F.2d 953 (1st Cir.) (later development in the *Hawkins* case); Cloutier v. Kasheta, 105 N.H. 262, 197 A.2d 627; Lakeman v. LaFrance, 102 N.H. 300, 305, 156 A.2d 123.

Other cases, including a number in New York, without distinctly repudiating the *Hawkins* type of analysis, have indicated that a different and generally more lenient measure of damages is to be applied in patient-physician actions based on breach of alleged special agreements to effect a cure, attain a stated result, or employ a given medical method. This measure is expressed in somewhat variant ways, but the substance is that the plaintiff is to recover any expenditures made by him and for other detriment (usually not specifically described in the opinions) following proximately and foreseeably upon the defendant's failure to carry out his promise. Robins v. Finestone, 308 N.Y. 543, 546, 127 N.E.2d 330; Frankel v. Wolper, 181 App. Div. 485, 488, 169 N.Y.S. 15, affd., 228 N.Y. 582, 127 N.E. 913; Frank v. Maliniak, 232 App.Div. 278, 280, 249 N.Y.S. 514; Colvin v. Smith, 276 App.Div. 9, 10, 92 N.Y.S.2d 794;[3] Stewart v. Rudner, 349 Mich. 459, 465–473, 84 N.W.2d 816. Cf. Carpenter v. Moore, 51 Wash.2d 795, 322 P.2d 125. This, be it noted, is not a "restitution" measure, for it is not limited to restoration of the benefit conferred on the defendant (the fee paid) but includes other expenditures, for example, amounts paid for medicine and nurses; so also it would seem according to its logic to take in damages for any worsening of the plaintiff's condition due to the breach. Nor is it an "expectancy" measure, for it does not appear to contemplate recovery of the whole difference in value between the condition as promised and the condition actually resulting from the treatment. Rather the tendency of the formulation is to put the plaintiff back in the position he occupied just before the parties entered upon the agreement, to compensate him for the detriments he suffered in reliance upon the agreement. This kind of intermediate pattern of recovery for breach of contract is discussed in the suggestive article by Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52, 373, where the authors show that, although not attaining the currency of the standard measures, a "reliance" measure has for special reasons been applied by the courts in a variety of settings, including noncommercial settings. See 46 Yale L.J. at 396–401.[4]

For breach of the patient-physician agreements under consideration, a recovery limited to restitution seems plainly too meager, if the agreements are to be enforced at all. On the other hand, an expectancy recovery may well be excessive. The factors, already mentioned, which have made the cause of action somewhat suspect, also suggest moderation as to the breadth of the recovery that should be permitted. Where, as in the case at bar and

3. See Horowitz v. Bogart, 218 App.Div. 158, 160, 217 N.Y.S. 881; Monahan v. Devinny, 223 App.Div. 547, 548, 229 N.Y.S. 60; Keating v. Perkins, 250 App.Div. 9, 10, 293 N.Y.S. 197 and comment in 5 U. of Chicago L.Rev. 156.

4. Some of the exceptional situations mentioned where reliance may be preferred to expectancy are those in which the latter measure would be hard to apply or would impose too great a burden; performance was interfered with by external circumstances; the contract was indefinite. See 46 Yale L.J. at 373–386; 394–396.

in a number of the reported cases, the doctor has been absolved of negligence by the trier, an expectancy measure may be thought harsh. We should recall here that the fee paid by the patient to the doctor for the alleged promise would usually be quite disproportionate to the putative expectancy recovery. To attempt, moreover, to put a value on the condition that would or might have resulted, had the treatment succeeded as promised, may sometimes put an exceptional strain on the imagination of the fact finder. As a general consideration, Fuller and Perdue argue that the reasons for granting damages for broken promises to the extent of the expectancy are at their strongest when the promises are made in a business context, when they have to do with the production or distribution of goods or the allocation of functions in the market place; they become weaker as the context shifts from a commercial to a noncommercial field. 46 Yale L.J. at 60–63.

There is much to be said, then, for applying a reliance measure to the present facts, and we have only to add that our cases are not unreceptive to the use of that formula in special situations. We have, however, had no previous occasion to apply it to patient-physician cases.[5]

The question of recovery on a reliance basis for pain and suffering or mental distress requires further attention. We find expressions in the decisions that pain and suffering (or the like) are simply not compensable in actions for breach of contract. The defendant seemingly espouses this proposition in the present case. True, if the buyer under a contract for the purchase of a lot of merchandise, in suing for the seller's breach, should claim damages for mental anguish caused by his disappointment in the transaction, he would not succeed; he would be told, perhaps, that the asserted psychological injury was not fairly foreseeable by the defendant as a probable consequence of the breach of such a business contract. See Restatement: Contracts, § 341, and comment a. But there is no general rule barring such items of damage in actions for breach of con-

5. In Mt. Pleasant Stable Co. v. Steinberg, 238 Mass. 567, 131 N.E. 295, the plaintiff company agreed to supply teams of horses at agreed rates as required from day to day by the defendant for his business. To prepare itself to fulfill the contract and in reliance on it, the plaintiff bought two "Cliest" horses at a certain price. When the defendant repudiated the contract, the plaintiff sold the horses at a loss and in its action for breach claimed the loss as an element of damages. The court properly held that the plaintiff was not entitled to this item as it was also claiming (and recovering) its lost profits (expectancy) on the contract as a whole. Cf. Noble v. Ames Mfg. Co., 112 Mass. 492. (The loss on sale of the horses is analogous to the pain and suffering for which the patient would be disallowed a recovery in Hawkins v. McGee, 84 N.H. 114, 146 A. 641, because he was claiming and recovering expectancy damages.) The court in the *Mt. Pleasant* case referred, however, to Pond v. Harris, 113 Mass. 114, as a contrasting situation where the expectancy could not be fairly determined. There the defendant had wrongfully revoked an agreement to arbitrate a dispute with the plaintiff (this was before such agreements were made specifically enforceable). In an action for the breach, the plaintiff was held entitled to recover for his preparations for the arbitration which had been rendered useless and a waste, including the plaintiff's time and trouble and his expenditures for counsel and witnesses. The context apparently was commercial but reliance elements were held compensable when there was no fair way of estimating an expectancy. See, generally, annotation, 17 A.L.R.2d 1300. A noncommercial example is Smith v. Sherman, 4 Cush. 408, 413–414, suggesting that a conventional recovery for breach of promise of marriage included a recompense for various efforts and expenditures by the plaintiff preparatory to the promised wedding. See Garfield & Proctor Coal Co. v. Pennsylvania Coal & Coke Co., 199 Mass. 22, 43, 84 N.E. 1020; Narragansett Amusement Co. v. Riverside Park Amusement Co., 260 Mass. 265, 279–281, 157 N.E. 532. Cf. Johnson v. Arnold, 2 Cush. 46, 47; Greany v. McCormick, 273 Mass. 250, 253, 173 N.E. 411. But cf. Irwin v. Worcester Paper Box Co., 246 Mass. 453, 141 N.E. 286.

tract. It is all a question of the subject matter and background of the contract, and when the contract calls for an operation on the person of the plaintiff, psychological as well as physical injury may be expected to figure somewhere in the recovery, depending on the particular circumstances. The point is explained in Stewart v. Rudner, 349 Mich. 459, 469, 84 N.W.2d 816. Cf. Frewen v. Page, 238 Mass. 499, 131 N.E. 475; McClean v. University Club, 327 Mass. 68, 97 N.E.2d 174. Again, it is said in a few of the New York cases, concerned with the classification of actions for statute of limitations purposes, that the absence of allegations demanding recovery for pain and suffering is characteristic of a contract claim by a patient against a physician, that such allegations rather belong in a claim for malpractice. See Robins v. Finestone, 308 N.Y. 543, 547, 127 N.E.2d 330; Budoff v. Kessler, 2 A.D.2d 760, 153 N.Y.S.2d 654. These remarks seem unduly sweeping. Suffering or distress resulting from the breach going beyond that which was envisaged by the treatment as agreed, should be compensable on the same ground as the worsening of the patient's condition because of the breach. Indeed it can be argued that the very suffering or distress "contracted for" —that which would have been incurred if the treatment achieved the promised result —should also be compensable on the theory underlying the New York cases. For that suffering is "wasted" if the treatment fails. Otherwise stated, compensation for this waste is arguably required in order to complete the restoration of the status quo ante.[6]

[5] In the light of the foregoing discussion, all the defendant's exceptions fail: the plaintiff was not confined to the recovery of her out-of-pocket expenditures; she was entitled to recover also for the worsening of her condition,[7] and for the pain and suffering and mental distress involved in the third operation. These items were compensable on either an expectancy or a reliance view. We might have been required to elect between the two views if the pain and suffering connected with the first two operations contemplated by the agreement, or the whole difference in value between the present and the promised conditions, were being claimed as elements of damage. But the plaintiff waives her possible claim to the former element, and to so much of the latter as represents the

6. Recovery on a reliance basis for breach of the physician's promise tends to equate with the usual recovery for malpractice, since the latter also looks in general to restoration of the condition before the injury. But this is not paradoxical, especially when it is noted that the origins of contract lie in tort. See Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 Col.L.Rev. 576, 594–596; Breitel, J. in Stella Flour & Feed Corp. v. National City Bank, 285 App.Div. 182, 189, 136 N.Y.S.2d 139 (dissenting opinion). A few cases have considered possible recovery for breach by a physician of a promise to sterilize a patient, resulting in birth of a child to the patient and spouse. If such an action is held maintainable, the reliance and expectancy measures would, we think, tend to equate, because the promised condition was preservation of the family status quo. See Custodio v. Bauer, 251 Cal.App.2d 303, 59 Cal.Rptr. 463; Jackson v. Anderson, 230 So.2d 503 (Fla.App.). Cf. Troppi v. Scarf, 31 Mich.App. 240, 187 N.W.2d 511. But cf. Ball v. Mudge, 64 Wash.2d 247, 391 P.2d 201; Doerr v. Villate, 74 Ill.App.2d 332, 220 N.E.2d 767; Shaheen v. Knight, 11 Pa.D. & C.2d 41. See also annotation, 27 A.L.R.3d 906.

It would, however, be a mistake to think in terms of strict "formulas." For example, a jurisdiction which would apply a reliance measure to the present facts might impose a more severe damage sanction for the wilful use by the physician of a method of operation that he undertook not to employ.

7. That condition involves a mental element and appraisal of it properly called for consideration of the fact that the plaintiff was an entertainer. Cf. McQuaid v. Michou, 85 N.H. 299, 303–304, 157 A. 881 (discussion of continuing condition resulting from physician's breach).

difference in value between the promised condition and the condition before the operations.

Plaintiff's exceptions waived.

Defendant's exceptions overruled.

Antonio SABATINELLI

v.

Daniel M. BUTLER (and a companion case).

Supreme Judicial Court of Massachusetts, Worcester.

Argued Jan. 4, 1973.

Decided May 8, 1973.

Tort action was brought against son and father to recover for injuries son inflicted on plaintiff when he shot him in back. The Superior Court, Beaudreau, J., directed verdict for son on one of two counts and for father on both counts and jury returned a verdict for plaintiff against son on first count, and consolidated substitute bills of exception were filed. The Supreme Judicial Court, Tauro, C. J., held that son, having been found guilty of intentionally inflicting injury, could not also be found guilty of negligence, notwithstanding that he had violated various penal statutes. Also, the court held that father could not be held responsible in absence of showing that he knew or should have known of son's misuse or propensity for misuse of guns or other weapons.

Exceptions overruled.

1. Exceptions, Bill of ⇐45

Counsel proceeds at his own and his client's peril in tendering extremely lengthy, repetitious bill of exceptions interspersed with long passages from the transcript and with other irrelevant matters. M.G.L.A. c. 231 § 113.

2. Exceptions, Bill of ⇐51

Trial court must insist on compliance with statutory requirements before approving a bill of exceptions. M.G.L.A. c. 231 § 113.

3. Negligence ⇐1

Difference between intentional and negligent conduct is a difference in kind and not in degree; if conduct is negligent it cannot also be intentional; similarly, a finding of intentional conduct precludes a finding that the same conduct was negligent.

4. Negligence ⇐6

When violations of penal statutes result from deliberate and intentional conduct, they cannot be considered evidence of negligence; in this respect violations of a statute cannot be treated as different and apart from the conduct that constitutes the violation.

5. Weapons ⇐18(1)

Where defendant had been found guilty of unlawfully, i. e., intentionally or wantonly or recklessly, shooting plaintiff, defendant could not also be found to have negligently inflicted injury, notwithstanding that he also violated certain penal statutes. M.G.L.A. c. 265 § 15A; c. 269 §§ 10, 12D.

6. Parent and Child ⇐13(1)

To extent that a parent's negligence is posited on his ability to control his child, age of the child is a relevant factor. M.G.L.A. c. 231 § 85G.

7. Weapons ⇐18(1)

Where, over a number of years, father had observed 20-year-old son take a gun and go hunting without mishap, father had properly warned son about danger of guns and it was not shown that father had any knowledge of son's prior acts of

Dr. Joseph T. SEDMAK, III and Linda Sedmak, Plaintiffs-Respondents,

v.

CHARLIE'S CHEVROLET, INC., a Missouri Corporation, Defendant-Appellant.

No. 41378.

Missouri Court of Appeals, Eastern District, Division Four.

June 16, 1981.

In action for breach of contract to sell automobile, the Circuit Court of the City of St. Louis, Richard J. Mehan, J., ordered specific performance, and automobile dealership, as prospective seller, appealed. The Court of Appeals, Satz, J., held that: (1) manufacturer's suggested retail price was sufficiently definite to meet price requirements of enforceable contract; (2) part payment evidenced existence of contract as satisfactorily as would written memorandum of agreement; and (3) prospective buyers showed entitlement to specific performance.

Judgment affirmed.

1. Appeal and Error ⇐846(1), 1010.1(6), 1012.1(1)

On review of court-tried case, Court of Appeals sustains judgment of trial court unless judgment is not supported by substantial evidence, is against weight of evidence or erroneously declares or applies law.

2. Appeal and Error ⇐994(3)

In conducting review of court-tried case, Court of Appeals does not judge credibility of witnesses, since such task properly rests with trial court. V.A.M.R. 73.01(c)(2).

3. Sales ⇐87(3)

Evidence in action for breach of contract to purchase automobile was sufficient to support trial court's conclusion that parties agreed that selling price would be price suggested by manufacturer, and whether such price accurately reflected market demands on any given day was immaterial.

4. Sales ⇐1(3)

Manufacturer's suggested retail price for automobile was ascertainable; thus, if parties chose, such price was sufficiently definite to meet price requirements of enforceable contract, and failure to specify selling price in dollars and cents did not render contract void or voidable. V.A.M.S. § 400.2-305.

5. Sales ⇐1(3)

As long as parties to contract for purchase of automobile agreed to method by which price was to be determined and as long as price could be ascertained at time of performance, price requirement for valid and enforceable contract was satisfied.

6. Frauds, Statute of ⇐95(1)

Part payment satisfies statute of frauds, not for entire contract, but only for that quantity of goods to which part payment can be apportioned, since part payment alone does not establish oral contract's quantity term. V.A.M.S. § 400.2-201(3)(c).

7. Frauds, Statute of ⇐95(1)

Statute validating divisible oral contract only for as much of goods as has been paid for was drafted to provide method for enforcing oral contracts where there is quantity dispute, and does not necessarily resolve statute of frauds problem where there is no quantity dispute, since neither language of statute nor its logical dictates necessarily invalidate oral contract for indivisible commercial unit where part payment has been made and accepted; if there is no dispute as to quantity, part payment still retains probative value to prove existence of contract. V.A.M.S. § 400.2-201(3)(c).

8. Frauds, Statute of ⇐95(1)

Where there is no quantity dispute, part payment evidences existence of oral contract as satisfactorily as would written memorandum of agreement under liberalized criteria of Uniform Commercial Code. V.A.M.S. §§ 400.1-101 et seq., 400.2-201(3)(c).

9. Frauds, Statute of ⇐106(1)

Under Uniform Commercial Code, written memorandum takes oral contract out of statute of frauds if it evidences contract for sale of goods, if it is "signed," including any authentication which identifies party to be charged and if it specifies a quantity. V.A.M.S. § 400.2–201 comment.

See publication Words and Phrases for other judicial constructions and definitions.

10. Frauds, Statute of ⇐95(1)

Where part payment evidenced contract for sale of automobile, dealership was identified as one who received payment and quantity was not in dispute because prospective buyers were claiming to have purchased only one automobile, part payment evidenced existence of contract as satisfactorily as would written memorandum of agreement under Uniform Commercial Code. V.A.M.S. §§ 400.2–201(3)(c), 400.2–201 comment.

11. Frauds, Statute of ⇐95(1)

Where there is no dispute as to quantity, part payment for single, indivisible commercial unit validates oral contract under Uniform Commercial Code. V.A.M.S. § 400.2–201(3)(c).

12. Specific Performance ⇐8

Although determination whether to order specific performance lies within discretion of trial court, specific performance goes as matter of right when relevant equitable principles have been met and contract is fair and plain.

13. Specific Performance ⇐69

In action for specific performance of contract to sell automobile, conclusion that purchasers had no adequate remedy at law for reason that they could not go upon open market and purchase automobile of kind at issue with same mileage, condition, ownership and appearance except, if at all, with considerable expense, trouble, loss, great delay and inconvenience was correct expression of relevant law and supported by evidence.

Kappel, Neill & Staed, C. William Portell, Jr., St. Louis, for defendant-appellant.

Moser, Marsalek, Carpenter, Cleary, Jaeckel, Keaney & Brown by William L. Davis, St. Louis, for plaintiffs-respondents.

SATZ, Judge.

This is an appeal from a decree of specific performance. We affirm.

In their petition, plaintiffs, Dr. and Mrs. Sedmak (Sedmaks), alleged they entered into a contract with defendant, Charlie's Chevrolet, Inc. (Charlie's), to purchase a Corvette automobile for approximately $15,000.00. The Corvette was one of a limited number manufactured to commemorate the selection of the Corvette as the Pace Car for the Indianapolis 500. Charlie's breached the contract, the Sedmaks alleged, when, after the automobile was delivered, an agent for Charlie's told the Sedmaks they could not purchase the automobile for $15,000.00 but would have to bid on it.

The trial court found the parties entered into an oral contract and also found the contract was excepted from the Statute of Frauds. The court then ordered Charlie's to make the automobile "available for delivery" to the Sedmaks.

Charlie's raises three points on appeal: (1) the existence of an oral contract is not supported by the credible evidence; (2) if an oral contract exists, it is unenforceable because of the Statute of Frauds; and (3) specific performance is an improper remedy because the Sedmaks did not show their legal remedies were inadequate.

[1, 2] This was a court-tried case. The scope of our review is defined by the well-known principles set out in *Murphy v. Carron*, 536 S.W.2d 30 (Mo. banc 1976). We sustain the judgment of the trial court unless the judgment is not supported by substantial evidence, unless it is against the weight of the evidence or unless it erroneously declares or applies the law. *Id.* at 32. In conducting our review, we do not judge the credibility of witnesses. That task quite properly rests with the trial court.

Rule 73.01(c)(2); *Kim Mfg., Inc. v. Superior Metal Treating, Inc.*, 537 S.W.2d 424, 428 (Mo.App.1976).

In light of these principles, the record reflects the Sedmaks to be automobile enthusiasts, who, at the time of trial, owned six Corvettes. In July, 1977, "Vette Vues," a Corvette fancier's magazine to which Dr. Sedmak subscribed, published an article announcing Chevrolet's tentative plans to manufacture a limited edition of the Corvette. The limited edition of approximately 6,000 automobiles was to commemorate the selection of the Corvette as the Indianapolis 500 Pace Car. The Sedmaks were interested in acquiring one of these Pace Cars to add to their Corvette collection. In November, 1977, the Sedmaks asked Tom Kells, sales manager at Charlie's Chevrolet, about the availability of the Pace Car. Mr. Kells said he did not have any information on the car but would find out about it. Kells also said if Charlie's were to receive a Pace Car, the Sedmaks could purchase it.

On January 9, 1978, Dr. Sedmak telephoned Kells to ask him if a Pace Car could be ordered. Kells indicated that he would require a deposit on the car, so Mrs. Sedmak went to Charlie's and gave Kells a check for $500.00. She was given a receipt for that amount bearing the names of Kells and Charlie's Chevrolet, Inc. At that time, Kells had a pre-order form listing both standard equipment and options available on the Pace Car. Prior to tendering the deposit, Mrs. Sedmak asked Kells if she and Dr. Sedmak were "definitely going to be the owners." Kells replied, "yes." After the deposit had been paid, Mrs. Sedmak stated if the car was going to be theirs, her husband wanted some changes made to the stock model. She asked Kells to order the car equipped with an L82 engine, four speed standard transmission and AM/FM radio with tape deck. Kells said that he would try to arrange with the manufacturer for these changes. Kells was able to make the changes, and, when the car arrived, it was equipped as the Sedmaks had requested.

Kells informed Mrs. Sedmak that the price of the Pace Car would be the manufacturer's retail price, approximately $15,000.00. The dollar figure could not be quoted more precisely because Kells was not sure what the ordered changes would cost, nor was he sure what the "appearance package"—decals, a special paint job—would cost. Kells also told Mrs. Sedmak that, after the changes had been made, a "contract"—a retail dealer's order form—would be mailed to them. However, no form or written contract was mailed to the Sedmaks by Charlie's.

On January 25, 1978, the Sedmaks visited Charlie's to take delivery on another Corvette. At that time, the Sedmaks asked Kells whether he knew anything further about the arrival date of the Pace Car. Kells replied he had no further information but he would let the Sedmaks know when the car arrived. Kells also requested that Charlie's be allowed to keep the car in their showroom for promotional purposes until after the Indianapolis 500 Race. The Sedmaks agreed to this arrangement.

On April 3, 1978, the Sedmaks were notified by Kells that the Pace Car had arrived. Kells told the Sedmaks they could not purchase the car for the manufacturer's retail price because demand for the car had inflated its value beyond the suggested price. Kells also told the Sedmaks they could bid on the car. The Sedmaks did not submit a bid. They filed this suit for specific performance.

Mr. Kells' testimony about his conversations with the Sedmaks regarding the Pace Car differed markedly from the Sedmaks' testimony. Kells stated that he had no definite price information on the Pace Car until a day or two prior to its arrival at Charlie's. He denied ever discussing the purchase price of the car with the Sedmaks. He admitted, however, that after talking with the Sedmaks on January 9, 1978,[1] he telephoned the zone manager and requested changes be made to the Pace Car. He

1. According to Kells' testimony, both Mr. and Mrs. Sedmak visited Charlie's on January 9, 1978. Mrs. Sedmak testified only she visited Charlie's on that date.

denied the changes were made pursuant to Dr. Sedmak's order. He claimed the changes were made because they were "more favorable to the automobile" and were changes Dr. Sedmak "preferred." In ordering the changes, Kells said he was merely taking Dr. Sedmak's advice because he was a "very knowledgeable man on the Corvette." There is no dispute, however, that when the Pace Car arrived, it was equipped with the options requested by Dr. Sedmak.

Mr. Kells also denied the receipt for $500.00 given him by Mrs. Sedmak on January 9, 1978, was a receipt for a deposit on the Pace Car. On direct examination, he said he "accepted a five hundred dollar ($500) deposit from the Sedmaks to assure them the first opportunity of purchasing the car." On cross-examination, he said: "We were accepting bids and with the five hundred dollar ($500) deposit it was to give them the first opportunity to bid on the car." Then after acknowledging that other bidders had not paid for the opportunity to bid, he explained the deposit gave the Sedmaks the "last opportunity" to make the final bid. Based on this evidence, the trial court found the parties entered into an oral contract for the purchase and sale of the Pace Car at the manufacturer's suggested retail price.

Charlie's first contends the Sedmaks' evidence is "so wrought with inconsistencies and contradictions that a finding of an oral contract for the sale of a Pace Car at the manufacturer's suggested retail price is clearly against the weight of the evidence." We disagree. The trial court chose to believe the Sedmaks' testimony over that of Mr. Kells and the reasonableness of this belief was not vitiated by any real contradictions in the Sedmaks' testimony. Charlie's examples of conflict are either facially not contradictory or easily reconcilable.

Although not clearly stated in this point or explicitly articulated in its argument, Charlie's also appears to argue there was no contract because the parties did not agree to a price. The trial court concluded "[t]he price was to be the suggested retail price of the automobile at the time of delivery." Apparently, Charlie's argues that if this were the agreed to price, it is legally insufficient to support a contract because the manufacturer's suggested retail price is not a mandatory, fixed and definite selling price but, rather, as the term implies, it is merely a suggested price which does not accurately reflect the market and the actual selling price of automobiles. Charlie's argument is misdirected and, thus, misses the mark.

[3–5] Without again detailing the facts, there was evidence to support the trial court's conclusion that the parties agreed the selling price would be the price suggested by the manufacturer. Whether this price accurately reflects the market demands on any given day is immaterial. The manufacturer's suggested retail price is ascertainable and, thus, if the parties choose, sufficiently definite to meet the price requirements of an enforceable contract. Failure to specify the selling price in dollars and cents did not render the contract void or voidable. *See, e. g., Klaber v. Lahar*, 63 S.W.2d 103, 106–107 (Mo.1933); *see also*, § 400.2–305 RSMo 1978. As long as the parties agreed to a method by which the price was to be determined and as long as the price could be ascertained at the time of performance, the price requirement for a valid and enforceable contract was satisfied. *See Burger v. City of Springfield*, 323 S.W.2d 777, 783–84 (Mo.1959); *see also, Allied Disposal, Inc. v. Bob's Home Service, Inc.*, 595 S.W.2d 417, 419–20 (Mo.App.1980) and § 400.2–305 RSMo 1978. This point is without merit.

Charlie's next complains that if there were an oral contract, it is unenforceable under the Statute of Frauds. The trial court concluded the contract was removed from the Statute of Frauds either by the written memoranda concerning the transaction or by partial payment made by the Sedmaks. We find the latter ground a sufficient answer to defendant's complaint. We discuss it and do not consider or address the former ground.

[6] Prior to our adoption of the Uniform Commercial Code, part payment for goods was sufficient to remove the entire contract from the Statute of Frauds. § 432.020 RSMo 1949; *Woodburn v. Cogdal*, 39 Mo. 222, 228 (1866); *See Coffman v. Fleming*, 301 Mo. 313, 256 S.W. 731, 732–733 (1923). This result followed from the logical assumption that money normally moves from one party to another not as a gift but for a bargain. The basis of this rule is the probative value of the act—part payment shows the existence of an agreement. *3 Sales & Bulk Transfers Under U.C.C.*, (Bender), § 2.04[5] at 2–96. However, "[t]his view overlooks the fact that, although ... part payment of the price does indicate the existence of an agreement, [it does] not reveal [the agreement's] quantity term, a key provision without which the court cannot reconstruct the contract fairly and provide against fraudulent claims." *1 Hawkland, A Transactional Guide To The Uniform Commercial Code* (1964), § 1.1202 at 28. Thus, under this rule a buyer who orally purchased one commercial unit for $10.00 could falsely assert he purchased 100 units and, then, by also asserting a $10.00 payment was part payment on the 100 units, he could, in theory and in practice, convince the trier of fact that the contract entered into was for 100 units. The Code attempts to correct this defect by providing that part payment of an oral contract satisfies the Statute of Frauds *only* "with respect to goods for which payment has been made and accepted ...." § 400.2–201(3)(c) RSMo 1978. Under this provision, part payment satisfies the Statute of Frauds, not for the entire contract, but only for that quantity of goods to which part payment can be apportioned.[2] This change simply reflects the rationale that part payment alone does not establish the oral contract's quantity term.

In correcting one problem, however, the change creates another problem when, as in the instant case, payment for a single unit sale has been less than full. Obviously, this part payment cannot be apportioned and, thus, the question arises how shall this subsection of the Code be applied. The few courts that have considered this question have used opposing logic and, thus, reached opposing answers. At least one court reads and applies the changed provision literally and denies the enforcement of the oral contract because payment has not been received in full. *Williamson v. Martz*, 11 Pa. Dist. & Co.R.2d 33, 35 (1956). The *Williamson* Court reasoned:

> "Under the code, part payment takes the case out of the statute only to the extent for which payment has been made. The code therefore makes an important change by denying the enforcement of the contract where in the case of a single object the payment made is less than the full amount." *Id.* at 35.

Charlie's argues for this view. Other courts infer that part payment for one unit is still sufficient evidence that a contract existed between the parties and enforce the oral contract. *Lockwood v. Smigel*, 18 Cal. App.3d 800, 96 Cal.Rptr. 289 (1971); *Starr v. Freeport Dodge, Inc.*, 54 Misc.2d 271, 282 N.Y.S.2d 58 (N.Y.Dist.1967); *see also, Paloukos v. Intermountain Chevrolet Company*, 99 Idaho 740, 588 P.2d 939, 944 (1978); *Bertram Yacht Sales, Inc. v. West*, 209 So.2d 677, 679 (Fla.App.1968); *Thomaier v. Hoffman Chevrolet, Inc.*, 64 A.D.2d 492, 410 N.Y.S.2d 645, 648–649 (1978). We are persuaded by the cogency of the logic supporting this view.

> " 'Partial performance' as a substitute for the required memorandum can validate the contract only for the goods which have been accepted or for which payment has been made and accepted. .... If the Court can make a just apportionment, ..., the agreed price of any goods actually delivered can be recovered without a writing or, if the price has been paid, the seller can be forced to deliver an apportionable part of the goods."

2. § 400.2–201(3)(c) provides:

> "(3) A contract which does not satisfy the requirements [of a writing] but which is valid in other respects is enforceable
>
> . . . . . .
>
> (c) with respect to goods for which payment has been made and accepted or which have been received and accepted."

Interpreting this section, U.C.C. Comment 2 states:

[7] Admittedly, § 400.2–201(3)(c) does validate a divisible contract only for as much of the goods as has been paid for. However, this subsection was drafted to provide a method for enforcing oral contracts where there is a quantity dispute. *See Lockwood v. Smigel, supra,* 18 Cal. App.3d 800, 96 Cal.Rptr. at 291; *see also, 1 Hawkland, supra* at 28. The subsection does not necessarily resolve the Statute of Frauds problem where there is no quantity dispute. Neither the language of the subsection nor its logical dictates necessarily invalidate an oral contract for an indivisible commercial unit where part payment has been made and accepted. If there is no dispute as to quantity, the part payment still retains its probative value to prove the existence of the contract.

[8–10] Moreover, where, as here, there is no quantity dispute, part payment evidences the existence of a contract as satisfactorily as would a written memorandum of agreement under the liberalized criteria of the Code. The Code establishes only three basic requirements for a written memorandum to take an oral contract out of the Statute of Frauds. "First, it must evidence a contract for the sale of goods; second it must be 'signed,' a word which includes any authentication which identifies the party to be charged; and third, it must specify a quantity." § 400.2–201 RSMo 1978, U.C.C., Comment 1. Here, part payment evidences the contract for the sale of goods—the car. The party to be charged—Charlie's—is identified as the one who received payment. The quantity is not in dispute because the Sedmaks are claiming to have purchased one unit—the car. Thus, part payment here evidences the existence of a contract as satisfactorily as would a written memorandum of agreement under the Code. *Lockwood v. Smigel,* 18 Cal. App.3d 800, 96 Cal.Rptr. 289, 291 (1971); *see also Paloukos v. Intermountain Chevrolet Co.,* 99 Idaho 740, 588 P.2d 939, 944 (1978).

Finally, the Code has not changed the basic policy of the Statute of Frauds.

> "The purpose of the Statute of Frauds is to prevent the enforcement of alleged promises that were never made; it is not, and never has been, to justify the contractors in repudiating promises that were in fact made." *Corbin, The Uniform Commercial Code; Should It Be Enacted?* 59 Yale L.J. 821, 829 (1950).

Enforcement of the oral contract here carries out the purpose of the Statute of Frauds. Denial of the contract's existence frustrates that purpose. The present contract could not have contemplated less than one car. If the part payment is believed, it must have been intended to buy the entire car not a portion of the car. Thus, denying the contract because part payment cannot be apportioned encourages fraud rather than discouraging it. "The Statute of Frauds would be used to cut down the trusting buyer rather than to protect the one who, having made his bargain, parted with a portion of the purchase price as an earnest of his good faith." *Starr v. Freeport Dodge, Inc., supra,* 54 Misc.2d 271, 282 N.Y.S.2d at 61.

[11] We hold, therefore, that where, as here, there is no dispute as to quantity, part payment for a single indivisible commercial unit validates an oral contract under § 400.-2–201(3)(c) RSMo 1978.

[12, 13] Finally, Charlie's contends the Sedmaks failed to show they were entitled to specific performance of the contract. We disagree. Although it has been stated that the determination whether to order specific performance lies within the discretion of the trial court, *Landau v. St. Louis Public Service Co.,* 273 S.W.2d 255, 259 (Mo. 1954), this discretion is, in fact, quite narrow. When the relevant equitable principles have been met and the contract is fair and plain, " 'specific performance goes as a matter of right.' " *Miller v. Coffeen,* 280 S.W.2d 100, 102 (Mo.1955). Here, the trial court ordered specific performance because it concluded the Sedmaks "have no adequate remedy at law for the reason that they cannot go upon the open market and purchase an automobile of this kind with the same mileage, condition, ownership and appearance as the automobile involved in

this case, except, if at all, with considerable expense, trouble, loss, great delay and inconvenience." Contrary to defendant's complaint, this is a correct expression of the relevant law and it is supported by the evidence.

Under the Code, the court may decree specific performance as a buyer's remedy for breach of contract to sell goods "where the goods are unique or in other proper circumstances." § 400.2–716(1) RSMo 1978. The general term "in other proper circumstances" expresses the drafters' intent to "further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale." § 400.2–716, U.C.C., Comment 1. This Comment was not directed to the courts of this state, for long before the Code, we, in Missouri, took a practical approach in determining whether specific performance would lie for the breach of contract for the sale of goods and did not limit this relief only to the sale of "unique" goods. *Boeving v. Vandover*, 240 Mo.App. 117, 218 S.W.2d 175 (1945). In *Boeving*, plaintiff contracted to buy a car from defendant. When the car arrived, defendant refused to sell. The car was not unique in the traditional legal sense but, at that time, all cars were difficult to obtain because of war-time shortages. The court held specific performance was the proper remedy for plaintiff because a new car "could not be obtained elsewhere except at considerable expense, trouble or loss, which cannot be estimated in advance and under such circumstances [plaintiff] did not have an adequate remedy at law." *Id.* at 177–178. Thus, *Boeving*, presaged the broad and liberalized language of § 400.2–716(1) and exemplifies one of the "other proper circumstances" contemplated by this subsection for ordering specific performance. § 400.2–716, Missouri Code Comment 1. The present facts track those in *Boeving*.

The Pace Car, like the car in *Boeving*, was not unique in the traditional legal sense. It was not an heirloom or, arguably, not one of a kind. However, its "mileage, condition, ownership and appearance" did make it difficult, if not impossible, to obtain its replication without considerable expense, delay and inconvenience. Admittedly, 6,000 Pace Cars were produced by Chevrolet. However, as the record reflects, this is limited production. In addition, only one of these cars was available to each dealer, and only a limited number of these were equipped with the specific options ordered by plaintiffs. Charlie's had not received a car like the Pace Car in the previous two years. The sticker price for the car was $14,284.21. Yet Charlie's received offers from individuals in Hawaii and Florida to buy the Pace Car for $24,000.00 and $28,000.00 respectively. As sensibly inferred by the trial court, the location and size of these offers demonstrated this limited edition was in short supply and great demand. We agree, with the trial court. This case was a "proper circumstance" for ordering specific performance.

Judgment affirmed.

SMITH, P.J., and WEIER, J., concur.

CITY OF CAPE GIRARDEAU, Respondent,

v.

Michael JOHNSON, Appellant.

No. 42891.

Missouri Court of Appeals, Eastern District, Division Three.

June 23, 1981.

Defendant, who was convicted in city court of possession of intoxicating liquors while under the age of 21, in violation of city ordinance, was again convicted in a trial de novo in the Circuit Court, Cape Girardeau County, Marybelle Mueller, J.,

continued to refuse to cooperate in discovery); *Bank One,* 916 F.2d at 1079 (futility of lesser sanctions had been demonstrated). We believe the district court abused its discretion in immediately imposing a sanction that caused plaintiffs to lose their day in court.

To conclude, the district court found that defendant was prejudiced by plaintiffs' counsel's dilatory actions, and therefore, the preclusion of plaintiffs' expert testimony, leading to dismissal with prejudice, was warranted. We do not agree that this alleged prejudice, which is only one factor in the four-part *Regional Refuse* test, should outweigh the other three factors. The district court's order of January 24, 1995 did not mandate a definite and firm discovery cutoff date, but instead allowed the attorneys to waive by agreement. When the parties disagreed about whether waiver had occurred, the district court was inevitably brought into the dispute and decided to side with defendant in spite of the fact that plaintiffs were blameless and a letter in the record indicated that defendant had agreed to depose two of plaintiffs' expert witnesses on September 25, 1995, nearly a month after the discovery cutoff date. Given these circumstances, we find the district court abused its discretion in imposing the harsh sanction of preclusion of plaintiffs' expert witnesses, which, in effect, resulted in the dismissal of plaintiffs' case. The district court is reversed on this issue.

IV.

[5] We also believe the district court abused its discretion in granting defendant's motion for a protective order, preventing the deposition of defendant's expert witness.

Although plaintiffs' counsel should have attempted to depose defendant's expert witness before August 31, 1995, defendant had contributed to a delay in the deposition of defendant, Dr. Amigo, which had to precede the deposition of defendant's expert, Dr. Schirmer. Also, defendant failed to file the required reports of Dr. Schirmer under Fed. R.Civ.P. 26(a)(2)(B). Before defendant's expert could be required to be deposed, these reports should have been filed. We do not believe defendant should be rewarded for a delay, which he in part caused. The district court is reversed on this issue.

V.

To conclude, for the reasons stated herein, the district court's opinion and order of October 3, 1995 is **REVERSED**, and the case is **REMANDED** to the district court for proceedings consistent with this opinion.

BETACO, INC., Plaintiff–Appellee,

v.

The CESSNA AIRCRAFT COMPANY, Defendant–Appellant.

No. 95–1727.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 11, 1995.

Decided Dec. 10, 1996.

Purchaser of jet filed action against seller for breach of warranty. After remand, 32 F.3d 1126, the United States District Court for the Southern District of Indiana, John Paul Godich, United States Chief Magistrate Judge, entered judgment for buyer, and seller appealed. The Court of Appeals, Ilana Diamond Rovner, Circuit Judge, held that purchase agreement for jet was fully integrated and could not be contradicted by parol evidence of purported warranty that it had "more range" than previous model.

Reversed and remanded.

1. Evidence ⇐397(2)

Under Kansas law, in assessing whether parties intended document as final expres-

sion of their contractual agreement, which could not be contradicted by parol evidence, following factors should be considered: inclusion of merger or integration clauses in document under consideration, disclaimer of warranties, whether extrinsic term is one that parties would certainly have included in document had it been part of their agreement, sophistication of parties, and nature and scope of both prior negotiations between parties and any purported extrinsic terms. K.S.A. 84–2–202(b).

2. Evidence ⇐400(6)

Under Kansas law, purchase agreement for jet was fully integrated, and could not be contradicted by parol evidence of purported warranty that jet had "more range" than previous model, consistent with vague pre-contract representations, where purchase agreement contained straightforward integration clause, principal provisions of agreement occupied single sheet of paper, agreement incorporated written specifications as to jet's expected performance, including range, and expressly disclaimed any other warranties, and agreement was presented to sophisticated purchaser, who read and understood terms and who signed contract at moment of his own choosing, after making modifications. K.S.A. 84–2–202(b).

3. Evidence ⇐397(2)

Under Kansas law, inclusion of integration clause in written document is strong evidence that parties intended that document to represent entirety of their agreement, such that parol evidence may not be offered to contradict terms of agreement. K.S.A. 84–2–202(b).

4. Contracts ⇐175(1)

Under Kansas law, parties to a contract are presumed to comprehend contract terms in way those terms are ordinarily used.

5. Contracts ⇐93(2)

Under Kansas law, courts normally attribute to signatories to written agreement knowledge and understanding of terms contained in that agreement.

6. Evidence ⇐397(1)

Under Kansas law, merely showing that extrinsic term was discussed before contract was signed does not automatically open door to proof of that term by parol evidence. K.S.A. 84–2–202(b).

Brian T. Hunt, J.C. Buehler (argued), Indianapolis, IN, for Betaco, Inc.

Robert W. Wright, Stephen L. Vaughan (argued), Jeffrey R. Gaither, Locke, Reynolds, Boyd & Weisell, Indianapolis, IN, for Cessna Aircraft Co.

Before FLAUM and ROVNER, Circuit Judges, and WILLIAMS, District Judge.*

ILANA DIAMOND ROVNER, Circuit Judge.

Betaco, Inc. agreed to purchase a six-passenger CitationJet from the Cessna Aircraft Company for $2.495 million. After making deposits totaling $150,000 toward the purchase of the aircraft, Betaco decided that the anticipated range of the plane was unsatisfactory and canceled the contract. Cessna, invoking a contractual provision entitling it to keep deposits as liquidated damages in the event of cancellation, refused to return the $150,000 Betaco had advanced. Betaco filed this diversity action contending, among other things, that Cessna had breached a purported warranty not contained in the signed purchase agreement that the new CitationJet would have "more range" than its predecessor, the Citation I. A jury agreed that Cessna had made and breached the extrinsic warranty, and the district court ordered it to pay damages of $150,000 plus pre- and post-judgment interest.

In a prior appeal, we vacated the award of damages and remanded for the purpose of a bench hearing on whether the parties intended the purchase agreement they signed to be the complete embodiment of their contract. *Betaco, Inc. v. Cessna Aircraft Co.*, 32 F.3d 1126 (7th Cir.1994). After conducting that hearing, the district court answered this question in the negative. Finding that deter-

* The Honorable Ann Claire Williams, of the Northern District of Illinois, sitting by designation.

mination to be clearly erroneous, we reverse and remand with directions to enter a final judgment in favor of Cessna.

I.

Our opinion in the previous appeal contains an extensive summary of the underlying facts, and we will assume the reader's familiarity with that opinion. To set the stage for our analysis in this appeal, we shall repeat only a few key points.

In response to Betaco owner J. George Mikelsons' request for information about the CitationJet, Cessna sent Mikelsons a packet of materials including a cover letter from Robert T. Hubbard, a regional manager for Cessna, a twenty-three page executive summary providing general information and performance estimates for the new plane, and an unsigned but otherwise completed purchase agreement. In pertinent part, Hubbard's letter stated:

> Although a completely new design, the CitationJet has inherited all the quality, reliability, safety and economy of the more than 1600 Citations before it. At 437 miles per hour, the CitationJet is much faster, more efficient, and has more range than the popular Citation I. And its luxurious first-class cabin reflects a level of comfort and quality found only in much larger jets.

Pl.Ex. 1; *see* 32 F.3d at 1127–28.

The purchase agreement occupied both sides of one sheet of paper. "Exhibit A," attached and incorporated into that agreement, set forth preliminary specifications indicating that at its maximum gross takeoff weight of 10,000 pounds, the CitationJet would have a full fuel range of 1,500 nautical miles, plus or minus four percent, under specified conditions. Pl.Ex. 2 at 5 § 2. A highlighted clause in the purchase agreement disclaimed warranties beyond those contained in the preliminary specifications:

> EXCEPT FOR THE EXPRESS TERMS OF SELLER'S WRITTEN LIMITED WARRANTIES PERTAINING TO THE AIRCRAFT, WHICH ARE SET FORTH IN THE SPECIFICATION (EXHIBIT A), SELLER MAKES NO REPRESENTATIONS OR WARRANTIES EXPRESS OR IMPLIED, OF MERCHANTABILITY, FITNESS FOR ANY PARTICULAR PURPOSE, OR OTHERWISE WHICH EXTEND BEYOND THE FACE HEREOF OR THEREOF.... NO PERSON OR ENTITY IS AUTHORIZED TO MAKE ANY REPRESENTATIONS OR WARRANTIES OR TO ASSUME ANY OBLIGATIONS ON BEHALF OF SELLER.

Pl.Ex. 4 at 1. The agreement also included an integration clause:

> This agreement is the only agreement controlling this purchase and sale, express or implied, either verbal or in writing, and is binding on Purchaser and Seller, their heirs, executors, administrators, successors or assigns.... Purchaser acknowledges receipt of a written copy of this Agreement which may not be modified in any way except by written agreement executed by both parties.

Pl.Ex. 4 at 2 § IV ¶ 7. After making two modifications to the purchase agreement, Mikelsons signed it on behalf of Betaco. Ursula Jarvis, Cessna's administrative director, accepted one of Mikelsons' changes and rejected the other. *See* Pl.Ex. 10. She signed the agreement on behalf of Cessna.

In the first appeal, we reversed as premature the district court's ruling on summary judgment that the purchase agreement and incorporated specifications did not embody the parties' complete agreement, notwithstanding the express language disclaiming extrinsic warranties and declaring the purchase agreement to be the sole contract between the parties. We noted several circumstances which, contrary to the district court's finding, suggested that the parties in fact did intend for the purchase contract to reflect their complete agreement. First, the contract contained clauses expressly disclaiming extrinsic warranties and deeming the contract to be fully integrated; and we noted that the latter provision in particular is considered " 'strong evidence' " that the written contract represented the entirety of the agreement between the parties. 32 F.3d at 1133 (quoting *L.S. Heath & Son, Inc. v. AT & T Info. Sys., Inc.*, 9 F.3d 561, 569 (7th Cir.1993)). Second, we were skeptical of the notion that an extrinsic term as to the relative range of the aircraft was not the type of term that would ordinarily be included within

the agreement itself. *Id.* at 1134–36. Third, we did not think it significant that Mikelsons had failed to consult with a lawyer before signing the purchase agreement. The contract was not lengthy or obtuse, we pointed out, and Mikelsons, who had extensive experience as a pilot, airline executive, and purchaser of aircraft, was a sophisticated buyer. *Id.* at 1136.

Faced with these facts, we were tempted to hold, as a matter of law, that the purchase agreement was fully integrated (barring Betaco from seeking to establish the breach of any extrinsic warranty); but a reference in Mikelsons' affidavit to pre-contractual discussions about the range of the CitationJet convinced us that an evidentiary hearing on the matter was in order. Mikelsons' affidavit suggested that the "more range" reference in Hubbard's letter might have been the culmination of substantial discussions between the parties addressing Mikelsons' concern that the new jet be able to fly greater distances than the Citation I. If that were so, then there was at least the possibility that the later-signed purchase agreement did not embody all terms of the contract between the parties. We therefore remanded the case for a bench hearing as to whether the parties intended for the signed purchase agreement to constitute their entire agreement. *Id.* at 1137–38.

After taking evidence on this issue, the district court concluded that the parties did not intend for the purchase agreement to be a fully integrated document, and that the parties intended for the "more range" representation in Hubbard's letter to be a basis of their bargain. Consequently, the parol evidence rule (Kan.Stat.Ann. § 84–2–202) did not bar the introduction of the evidence on which the jury had relied in finding that Cessna had made an express warranty as to the relative range of the CitationJet and that it had breached that warranty. The court accordingly reinstated the jury's verdict on Count II of Betaco's complaint, the sole count on which Betaco had prevailed.

The court found at the outset that Mikelsons was a sophisticated purchaser of aircraft. Entry of Findings at 2 ¶ 6. Mikelsons had "built American Trans Air, the nation's tenth largest airline, from the ground up." Memorandum at 1. In addition, he had logged many hours as a pilot, he had extensive experience in the cockpits of a variety of aircraft, Betaco (of which Mikelsons is president) owned both a Citation I and a Citation II, and he was a frequent pilot of the Citation I. Entry of Findings at 2, ¶¶ 2–6; Memorandum at 1–2.

The court found further that at some time prior to receiving the packet of materials concerning the CitationJet that included the purchase agreement, "Mr. Mikelsons had one or more conversations with a Cessna representative in which Mr. Mikelsons expressed a desire to purchase an airplane comparable to the Citation I but with more range...." Entry of Findings at 3 ¶ 8.[1] Mikelsons, who flew the Citation I predominantly on personal trips, but sometimes on business, had found the range of that aircraft insufficient on occasion to reach the intended destination without a fuel stop. Memorandum at 2. Mikelsons testified, and the district court found, that in his discussions with the Cessna representative about the Citation I, he was assured that the CitationJet would have more range than the Citation I. Entry of Findings at 3 ¶ 8.

The court explained that "more range" in the aviation industry connotes a greater range at maximum takeoff weight with a full load of fuel. *Id.* ¶ 9. This, of course, is the payload configuration at which the specifications incorporated into the purchase agreement warranted a particular range (1,500 nautical miles), and as the district court noted, "the evidence is uncontradicted that the CitationJet *did* have greater range at that configuration." Memorandum at 4 n. 3 (emphasis in original). But, the court proceeded, "Mr. Mikelsons also testified at trial that the

1. The court believed that one or more such conversations had occurred because (1) Cessna had not included a purchase agreement in the informational packets it sent to other prospective customers, and it likely would not have forwarded a completed agreement to Mikelsons without prior discussion, (2) it was "highly doubtful" that Mikelsons would have signed the agreement, let alone on the very day he received it, without first contacting a Cessna representative, and (3) Mikelsons added terms to the agreement indicating that he had knowledge beyond the information included in the materials sent to him. Memorandum at 3.

'more range' language meant 'more range at all payload configurations' *to him*." *Id.* (emphasis in original). Thus, "[a]lthough it may be true that range comparisons are done at maximum gross takeoff weight with full fuel, it is not unreasonable to assume that, unless otherwise indicated, the range ratio of one airplane to another is relatively consistent throughout the spectrum of payloads." *Id.* Consistent with that assumption, the court found that "Mr. Mikelsons believed that the CitationJet's range would be significantly greater at all payload configurations than the Citation I's" (Entry of Findings at 4 ¶ 12), that he believed that the "more range" representation was a basis of the bargain and part of the contract (*id.* ¶ 13), and that Betaco would not have entered into the contract with Cessna had Mikelsons not believed that the CitationJet would have a greater range than the Citation I at all payload configurations (*id.* at 3 ¶ 11).

The district court found that Cessna shared Betaco's belief as to the relative range of the CitationJet and believed it to be part of the bargain. Entry of Findings at 4 ¶ 17; Memorandum at 8–9. "The foremost evidence supporting this conclusion is Cessna's clear attempt to attract customers in general, and Mr. Mikelsons specifically, with the range comparisons to the Citation I." Memorandum at 9. Moreover, Cessna's conduct after it entered into the purchase agreement supported the notion that Cessna believed the range comparison to be among the terms of its contract with Betaco. The court pointed out that several months after the contract was signed, Cessna sent Betaco an update on the CitationJet that contained preliminary data indicating that the new jet's range would exceed that of the Citation I by at least 100 nautical miles at all payload configurations. Memorandum at 9. "Clearly, at least as of April 3, 1990, Cessna had every intention of manufacturing an airplane with a greater range at all configurations than the Citation I." *Id.* Finally, the court noted that when Betaco first expressed concern that the CitationJet would not live up to this expectation, Cessna did not insist that "more range" was beyond their agreement, but instead attempted to persuade Betaco that the plane would, in fact, outdistance the Citation I at all payload configurations. *Id.* at 9–10.

Having found that the parties had intended the extrinsic term as to the relative range of the CitationJet to be a key term of their bargain, the court concluded that the purchase agreement, notwithstanding the integration clause, could not be deemed a fully integrated document. Memorandum at 10. In this regard, the court observed:

> Mr. Mikelsons did not know that he could rely on representations made in the Purchase Agreement or Specifications but not in the Hubbard letter or executive summary. He thought it was all part of "the deal." The integration clause in the Purchase Agreement does not clearly dispel such a notion. The clause integrates the parties' agreement into "this Agreement," but does not indicate what "this Agreement" is. Considering the fact that the word "agreement" is capitalized, that the clause speaks of a written copy of "this Agreement," and that elsewhere in the agreement it notes that "this Purchase Agreement" is "the 'Agreement,'" we, as attorneys, can rather easily conclude in retrospect that "this Agreement" refers to the writing on the front and back of the Purchase Agreement. This conclusion would not be openly evident to a layman based on a reading of the integration clause, or the entire Purchase Agreement for that matter. The Purchase Agreement, or "the Agreement," could have been further defined: "the terms of which are found exclusively on this page and the reverse page," but it was not. This deficiency in the integration clause is especially important in this case where the Purchase Agreement was sent with a packet of materials, some of which were ostensibly intended to be part of the agreement and some of which were not.

Memorandum at 6–7 (footnotes and record citation omitted).

II.

[1] We are satisfied that our first opinion adequately sets out the applicable legal principles, and no more than a modest re-cap is required here. Kansas law, of course, gov-

erns this dispute, and section 84–2–202 of the Kansas Statutes provides that a document intended by the parties as a final expression of their agreement may not be contradicted by evidence of any prior agreement or contemporaneous oral agreement, and may not be supplemented with evidence of consistent additional terms when a court finds that the parties intended the document to be the "complete and exclusive statement of the terms of the agreement." Kan. Stat. Ann. § 84–2–202(b). Thus, to the extent that Betaco and Cessna intended for the signed purchase agreement to include each and every term of their agreement, Betaco cannot attempt to establish by parol evidence a term beyond the four corners of that document and seek to recover damages for the purported breach of that term. *Id.; see* 32 F.3d at 1131. In assessing the intent of the parties, the following factors should be considered: (1) the inclusion of merger or integration clauses in the document under consideration, (2) the disclaimer of warranties, (3) whether the extrinsic term is one that the parties would certainly have included in the document had it been part of their agreement, (4) the sophistication of the parties, and (5) the nature and scope of both prior negotiations between the parties and any purported extrinsic terms. *Id.* at 1132–33 (quoting *Mid Continent Cabinetry, Inc. v. George Koch Sons, Inc.*, 1991 WL 151074, at *8 (D.Kan. July 11, 1991)).

[2] The question of the parties' intent is typically a factual one, particularly when it turns not just on the written provisions of their contract but on surrounding events that the parties may have interpreted and recalled differently. 32 F.3d at 1131. In this case, for example, Mikelsons testified that he had one or more conversations with Cessna officials about the relative range of the CitationJet before he received and signed the purchase agreement. Cessna denies that any such conversations took place. The district court credited Mikelsons on this point, and this assessment was obviously key to the district court's determination that the parties did not intend for the purchase agreement to be a fully integrated document. We are loathe to second-guess the district court's factual findings. Yet, the contractual language disavowing terms beyond the face of the purchase agreement is plain and unequivocal, and the evidence that Cessna has adduced in an effort to overcome this language is exceedingly weak. Having reviewed the record, we are unable to sustain the district court's ultimate finding that the parties did not intend for the purchase agreement to be fully integrated; that finding was, we believe, clearly erroneous.[2] The analysis which leads us to that conclusion will follow the list of relevant factors we identified above.

A. Merger and Integration Clauses

[3] As we observed in *Betaco I*, the inclusion of an integration clause in a written document is " 'strong evidence' " that the parties intended that document to represent the entirety of their agreement. 32 F.3d at 1133 (quoting *L.S. Heath & Son*, 9 F.3d at 569). The purchase agreement executed by Betaco and Cessna contains such a clause, stating both that the signed agreement "is the only agreement" controlling the purchase of the aircraft, that it "is binding on Purchaser and Seller," and that the agreement "may not be modified in any way except by written agreement executed by both parties." Pl.Ex. 4 at 2 § IV ¶ 7. We noted that the language of the clause is simple and straightforward, that it was not buried in fine print, and that it was not otherwise likely to be overlooked in an agreement that covered only two pages. 32 F.3d at 1133–34. We also pointed out that Mikelsons had signed the agreement containing this clause and that he had had the opportunity to review it before signing. *Id.* at 1134.

The integration clause speaks for itself, of course, and nothing adduced on remand has shaken our conviction that it constitutes

2. The clearly erroneous standard of review requires us "to distinguish between the situation in which we *think* that if we had been the trier of fact we would have decided the case differently and the situation in which we are *firmly convinced* that we would have done so." *Carr v. Allison Gas Turbine Div., General Motors Corp.*, 32 F.3d 1007, 1008 (7th Cir.1994) (emphasis in original). Our review "thus is deferential, but it is not abject." *Id.* Statements found in some cases suggesting that the standard is so deferential as to be nearly insurmountable are not authoritative. *Id.*

strong evidence that the parties intended the written purchase agreement to constitute the full embodiment of their contract. *Id.* at 1133–34. On the contrary, although extrinsic evidence ordinarily is unnecessary to establish that the parties to an agreement meant what they said in their contract,[3] Mikelsons' testimony on remand only confirms that the integration clause should be taken seriously. Mikelsons acknowledged that in signing the contract, he verified that he had read it, that he understood it, and that he had full authority to bind Betaco with his signature. Tr. 85; *see* Pl.Ex. 4 at 1. He acknowledged what the integration clause said; indeed, when asked by Cessna's counsel what he understood the language to mean, he answered, "Just exactly what it says, Mr. Buehler—that this contract is the only contract between the parties." Tr. 34.

[4] Now, Mikelsons also testified that he believed that Cessna's marketing was incorporated into the agreement (Tr. 34), and the district court thought the integration clause sufficiently unclear as to what it meant by "this Agreement" that a layperson might think that the agreement included representations outside of the purchase agreement itself (Memorandum at 6–7). Both suppositions fly directly in the face of the plain terms of the agreement. Taking the district court's point first, we discern no ambiguity as to what is meant by "this Agreement." In a document *entitled* "PURCHASE AGREEMENT," the consistent use of "this" naturally points the reader to the purchase agreement itself. Any doubt in this regard is then eradicated by the first paragraph on the reverse side of the agreement, entitled "TERMS AND CONDITIONS":

> The Purchaser and Seller as set forth in Items 1 and 2 hereby enter into this Purchase Agreement (the "Agreement") for the purchase and sale of one (1) Cessna CITATIONJET Model 525 Aircraft, with optional equipment as listed in Item 5 herein (the "Aircraft") on the terms and conditions as set forth on the face hereof and as follows[.]

Pl.Ex. 4 at 2. The parties to a contract are presumed to comprehend contract terms in the way those terms are ordinarily used. *E.g., McGee v. Equicor–Equitable HCA Corp.*, 953 F.2d 1192, 1202 (10th Cir.1992) (applying Kansas law). Thus, the district court's concerns about the lack of clarity notwithstanding, it is entirely reasonable to charge Mikelsons and Betaco with the realization that when the contract spoke of "this Agreement" being the sole agreement between the parties and disclaimed all representations beyond it, it meant that only those terms expressly incorporated within the two-page purchase agreement itself were part of the bargain. Mikelsons conceded that very understanding, in fact. Tr. 34. He claims to have thought that Hubbard's letter was imported into the agreement by virtue of a reference to marketing within the preliminary specifications (which were, of course, expressly made part of the purchase agreement). Tr. 34; *see also* Tr. 30. But that notion is both implausible and unreasonable. The word "marketing" appears in the preliminary specifications only twice, once on the title page and again on the introductory page, which simply indicate that the specifications were prepared by, and that more detailed information could be obtained from:

> Citation Marketing
> The Cessna Aircraft Company
> P.O. Box 7706
> Wichita, Kansas 67277

Pl.Ex. 2 at 2, 3. It is one thing to infer from these unadorned references to "Citation Marketing" that questions left unanswered by the preliminary specifications should be directed to a marketing representative; it is quite another to infer that anything a Cessna representative might say in promoting the plane, including the type of representations made in Hubbard's letter, would become a term of the purchase agreement. In the face

3. *Compare Ray Martin Painting, Inc. v. Ameron, Inc.*, 638 F.Supp. 768, 773–74 (D.Kan.1986) (integration clause in written warranty agreement negotiated and signed by two experienced business entities supported finding as a matter of law that written agreement was fully integrated) *with Transamerica Oil Corp. v. Lynes*, 723 F.2d 758, 763 (10th Cir.1983) (warranty disclaimer language in invoice that purchaser signed to acknowledge receipt of product did not render invoice a fully integrated contract; thus, proof of extrinsic term allowed).

of contractual terms expressly disavowing extrinsic warranties, admonishing that no individual was authorized to make representations on Cessna's behalf, and providing that modifications to the agreement had to be made in a writing signed by both parties, the latter inference strains credulity.

B. Warranty Disclaimers

A disclaimer of extrinsic warranties complements and reinforces the integration clause by making clear what is implicit in the notion of a fully integrated contract: that no representation not documented in the written agreement itself is part of the parties' bargain. Two brief points about the warranty disclaimer in this case deserve emphasis.

First, as we pointed out in *Betaco I*, the purchase agreement, in language highlighted by capitalized lettering, specifically disclaimed all warranties not expressly made part of the agreement and admonished that no one was authorized to make other warranties on Cessna's behalf. Pl.Ex. 4 at 1; *see* 32 F.3d at 1133. That alone calls into question the viability of a breach of warranty claim based on an extrinsic writing like Hubbard's cover letter to Mikelsons.

Second, this is not a case in which the purchase agreement purports to disclaim any and all warranties. Rather, as acknowledged in the disclaimer clause itself, the representations as to performance of the new jet set out in the preliminary specifications were made part of the contract. Those specifications, in turn, did address the range of the aircraft, indicating that it would have a full fuel range of 1,500 nautical miles under specified conditions. Taken at face value, therefore, the disclaimer clause confined Cessna's obligations as to the expected performance of the CitationJet to a limited and very specific set of preliminary specifications and expressly disavowed the type of casual representation made in Hubbard's letter.

Again, the testimony below gives us every reason to believe that Mikelsons appreciated the significance of the contract's language. Mikelsons affirmed that he had read and understood the warranty disclaimer provisions. Tr. 90. He also acknowledged that he was quite familiar with such provisions:

Q. Now, do you know what warranty disclaimers are?
A. Yes.
Q. Have you seen many in your lifetime?
A. Yes.
Q. Have you had warranty disclaimers in many of the contracts that your business has prepared?
A. Yes.
Q. So you're well acquainted and well experienced with warranty disclaimers?
A. Yes.

Tr. 85. Thus, we have contract language that is clear as to which warranties were made part of the agreement and which were not, signed by an individual who knew from his own experience what such disclaimers meant.

C. Whether the Alleged Extrinsic Warranty Was One That the Parties Certainly Would Have Included within the Purchase Agreement.

The purchase agreement itself was not silent as to the anticipated range of the CitationJet. The preliminary specifications incorporated into that agreement contained a section on "estimated performance" which listed some seven factors, among them the full fuel range of the aircraft; we reproduced that section in full in *Betaco I*. 32 F.3d at 1135. As we pointed out, "[t]his summary of the aircraft's performance is, in stark contrast to [Hubbard's] letter, quite precise and quite explicit about the assumptions underlying each of the estimates." *Id.* at 1136. Thus, Cessna clearly was willing to make certain performance estimates part of the contract, but when it did so it gave concrete estimates (a full fuel range of 1,500 nautical miles, for example) and made explicit the conditions under which those estimates would apply.

The fact that the purchase agreement addressed the range and did so with specificity indicates to us that had Cessna and Betaco intended for any additional representations as to the range of the CitationJet to be included in their contract, they would have been made an explicit part of the purchase agreement. It is not as if the relative range of the CitationJet vis-à-vis the Citation I was

different from the other types of factors addressed in the preliminary specifications, or one that could not be reduced to the level of detail otherwise reflected in the specifications. In fact, the only sense in which Hubbard's "more range" representation stands apart in kind from the terms expressly included in the contract is its extraordinary ambiguity. Given that the contract otherwise described the expected performance of the aircraft with a high degree of specificity, making all of the assumptions underlying each expectation explicit, it is utterly implausible to think that the parties would have understood the types of casual representations found in Hubbard's letter to be part of the same contract. Indeed, it is hard to believe that a manufacturer of aircraft that had attempted to limit its obligations to a carefully delineated set of performance estimates would substantially increase its exposure with an indefinite term like "more range." Equally implausible is the suggestion that Mikelsons, an experienced and sophisticated purchaser of aircraft with a professed concern about range, and with a staff available to crunch the numbers, would be content to spend nearly two-and-a-half million dollars on a plane on the mere assurance that it had "more range" than an earlier model. The district court thought that the parties treated this transaction more like the purchase of a family car than the purchase of a multi-million dollar jet. Memorandum at 5 n. 5. It may be that Mikelsons treated the purchase that casually. But we find no evidence in the record that Cessna did, or in particular that Cessna shared Mikelsons' professed expectation that an indefinite, extrinsic term like "more range" would become a term of the contract.

D. Sophistication of the Parties

Mikelsons brought with him to the purchase of the CitationJet a wealth of experience and sophistication. As the district court recognized, "[Mikelsons'] experience in the business of aviation cannot be denied." Memorandum at 2. He had logged over 18,000 hours in a variety of aircraft. He had established one of the nation's major airlines. Betaco, of which he was president, was in the business of purchasing and leasing aircraft. Betaco previously had purchased second-hand from Cessna a Citation I as well as a Citation II. Mikelsons himself had flown the Citation I extensively. Thus, as the district court found, "Betaco and Cessna were in relatively equal bargaining positions in this transaction." Entry of Findings at 2 ¶ 6.

Mikelsons is not, as the district court emphasized, a lawyer (*see* Memorandum at 6–7); and yet, his familiarity with the types of contract terms at issue here rendered him fully able to appreciate the import of those terms. As we have pointed out, Mikelsons read and understood the language in the purchase agreement disclaiming extrinsic warranties; he likewise read and understood the integration clause.

[5] We normally attribute to the signatories to a written agreement knowledge and understanding of the terms contained in that agreement. 32 F.3d at 1136 (quoting *Rosenbaum v. Texas Energies, Inc.*, 241 Kan. 295, 736 P.2d 888, 891–92 (1987)). Mikelsons' degree of sophistication certainly gives us no reason to depart from that rule here.

E. Nature and Scope of Prior Negotiations and the Purported Extrinsic Term

Despite the integration clause and the disclaimer of extrinsic warranties in the purchase agreement, Mikelsons' affidavit raised the possibility that the parties had engaged in substantial pre-contract negotiations as to the anticipated range of the CitationJet *relative* to the Citation I, a subject not addressed in the purchase agreement itself but that Betaco insists was central to its decision to purchase the new aircraft. Exploration of this possibility was the purpose of the remand we ordered. 32 F.3d at 1137–38.

[6] We did not mean to suggest, of course, that the door is open to proof of an extrinsic term whenever a party can establish that the subject of that term was discussed before the contract was signed. That would render contractual provisions disavowing any and all terms not contained within the four corners of the contract, not to mention statutory provisions like section 2–202, virtually meaningless. Rather, only in limited circumstances can a party overcome the bar of integration clauses and warranty disclaimers. *Transamerica Oil Corp. v. Lynes*, 723 F.2d 758 (10th Cir.1983) (applying Kan-

sas law), which we cited in *Betaco I*, offers an illustration. There, a company that drilled oil and gas wells purchased a product based on representations made in the manufacturer's advertising and in discussions with the manufacturer's representatives. When the product failed to perform as expected, the purchaser sued for breach of warranty. The manufacturer sought to rely on warranty disclaimers contained in the invoices that the purchaser signed on receipt of the product. The Tenth Circuit concluded that proof of extrinsic warranties was permissible nonetheless. "There was no negotiated document signed by both parties evidencing the sale of one or all of these [products]," the court pointed out (*id.* at 763), there was only the purchaser's signature on the invoice below the words "I certify that the above materials or services have been received" (*id.*). "These words indicate that the document is a delivery receipt and possibly a billing statement, but not a fully integrated contract." *Id.* Thus, despite additional language acknowledging the terms on the reverse side of the invoice, which included the warranty disclaimer, the court was satisfied that the invoice did not reflect the final agreement of the parties. *Id. Transamerica Oil* indicates, then, that the parties may resort to extrinsic terms in the face of contractual provisions disclaiming any and all such terms when, as was the case there, the terms of the disclaimer were unexpected and unbargained for. *See* Kan. Stat. Ann. § 84–2–316(1), official U.C.C. comment, "Purposes" ¶ 1; *see also* 723 F.2d at 762. Having reviewed the evidence adduced on remand, we are satisfied that the circumstances of this case do not fit within that narrow category.

This is not a case in which the purchaser of a product, whose expectations have been entirely shaped by precontract representations, is asked upon delivery to execute an "invoice" in which he unwittingly surrenders any and all claims based on those extrinsic representations. *Cf. Transamerica Oil*, 723 F.2d at 763; *Hemmert Agric. Aviation v. Mid–Continent Aircraft Corp.*, 663 F.Supp. 1546, 1553 (D.Kan.1987). Mikelsons was presented with a written purchase agreement in advance of his order, and he obviously controlled the timing of the order. He had, as we noted in *Betaco I*, every opportunity to review the agreement himself, to have his staff review it, and to seek the advice of legal counsel. 32 F.3d at 1134, 1136. The agreement incorporated detailed specifications as to the performance of the aircraft, and explicitly disclaimed any warranties not contained in those specifications. The limits of the contract were therefore plain, and neither time, disparity of resources, nor any other circumstance prevented Mikelsons and Betaco from appreciating those limits.

It is also clear that the terms of the purchase agreement did not amount to a take it or leave it proposition, depriving Betaco of the opportunity to negotiate further terms of importance to it. Before signing and returning the agreement to Cessna, Mikelsons added two terms to the agreement: one invoking the right to opt for an earlier delivery and aircraft serial number, in the event one became available, and the other invoking the right to exercise such an option at a price appropriate to the earlier serial number. Pl. Ex. 4 at 1. Jarvis, in turn, on Cessna's behalf, accepted one of these additional terms (that concerning an earlier delivery and serial number) and rejected the other. Pl.Ex. 10 at 1; *see also* Pl.Ex. 10 at 2 (final purchase agreement as modified).

In sum, we have a purchase agreement which in straightforward language declares itself to be the only agreement between the parties. Its principal provisions occupied a single sheet of paper. It incorporated written specifications as to the expected performance of the new aircraft, including its range. It expressly disclaimed any other warranties beyond these. It was presented to a sophisticated purchaser well grounded in aeronautics, who had purchased aircraft before, who was in the *business* of buying and leasing aircraft (not to mention running an airline). He read and understood the integration clause, he read and understood the warranty disclaimer clause—he had read such clauses before. He signed the contract at a moment of his own choosing, after making modifications.

All of this weighs heavily in favor of honoring the integration and warranty disclaimer clauses and precluding Betaco's effort to read into the parties' agreement an extrinsic term as to the relative range of the Citation-Jet. Mikelsons could not have been taken by

surprise by the contents of the purchase agreement in any sense of the word.

As we noted earlier, the district court found that at some time before Hubbard sent the purchase agreement and other materials to Mikelsons, "Mr. Mikelsons had one or more conversations with a Cessna representative in which Mr. Mikelsons expressed a desire to purchase an airplane comparable to the Citation I but with more range and in which the Cessna representative informed Mr. Mikelsons that the CitationJet had more range than the Citation I." Entry of Findings at 3 ¶ 8. We do not know which Citation representative made this assertion (it may have been Hubbard, but Mikelsons could not recall, *see, e.g.*, Tr. 58, 95), we do not know how many conversations there might have been, and we do not know in what detail the relative range of the two planes was discussed. But under Betaco's theory of the case, these discussions were the genesis of the "more range" representation in Hubbard's letter, a representation that Betaco insists, and the district court found, was central to Betaco's decision to purchase the plane. Entry of Findings at 3.

The indefinite character of the "more range" representation in Hubbard's letter remains as troublesome now as it was in the first appeal. As we noted in *Betaco I*, Hubbard's letter is "long on adjectives and short on details" (32 F.3d at 1135) and in that respect appeared much more like a standard promotional letter than the confirmation of a key contract term. It is now undisputed that Hubbard's letter was, in fact, a canned letter sent to many prospective purchasers of the CitationJet. Tr. 11415. So nothing in the content of the letter grew out of the one or more discussions Mikelsons previously had with the Cessna representative. More importantly, it is not at all clear what "more range" means.

The district court's findings on this key point are inconsistent. Recall that the district court first observed:

> The term "more range" means, as used in the aviation industry, greater range when compared at identical (standard) atmospheric conditions with each plane at its maximum gross takeoff weight with a full load of fuel.

Entry of Findings at 3, ¶ 9. Yet, as the district court itself noted, "the evidence is uncontradicted that the CitationJet *did* have greater range at that configuration." Memorandum at 4 n. 3 (emphasis in original). Thus, attributing the industry's understanding of "more range" to Hubbard gets Betaco nowhere; only if "more range" is construed to mean more range at *all* payloads does Betaco have a basis to claim a breach of this purported warranty. Here the district court equivocated. Despite the limited understanding in the industry of the phrase "more range," the court found that Mikelsons understood it to mean more range at all payloads. *Id.*; Entry of Findings at 4 ¶ 12. In the court's view, it was reasonable for Mikelsons to make this leap. "Although it may be true that range comparisons are done at maximum gross takeoff weight with full fuel," the court conceded, "it is not unreasonable to assume that, unless otherwise indicated, the range ratio of one airplane to another is relatively consistent throughout the spectrum of payloads." Memorandum at 4 n. 3. The principal support that the court cited for the notion that this was an assumption and understanding of "more range" that Cessna shared was a performance update that Cessna sent to Mikelsons on April 3, 1990, more than two months after Hubbard sent his letter to Mikelsons and Mikelsons signed the contract. Pl.Ex. 9 at 4; *see* Memorandum at 4 n. 3. That update contained a graph indicating that the CitationJet would have a greater range at all payloads than the Citation I. *See id.* But whatever this post-contract update may reveal about Cessna's expectations of the plane's performance, it tells us nothing about what Cessna's understanding of the contract was at the time Cessna and Betaco entered into it; and there certainly is no evidence establishing that Cessna agreed to make this "update" a contractual obligation on par with the preliminary specifications that had been incorporated into the contract expressly.[4]

4. As additional support for this proposition, the district court cited Cessna's effort to attract customers by trumpeting the CitationJet's greater range, as well as its efforts to persuade Betaco, once cancellation was threatened, that the new plane would in fact have more range than its predecessor at all payloads. Memorandum at 9–10. Vague marketing references to "more range" of the kind found in Hubbard's letter do

In essence, the court found that the parties made part of their agreement a vague, extrinsic term that purportedly has a particular meaning in the industry, but then it accorded that term a significantly broader meaning based on speculative assumptions in order to support Betaco's theory of recovery. This is a house of cards, and if the tenuous character of its tenets does not bring it down, the nature of Hubbard's letter does. To accept the notion that Hubbard's "more range" representation was a term as to which the parties shared a particular understanding that they wished to make part of their bargain, one must assume that it either was subject to negotiation or at least the culmination of negotiation. But, as we have noted, the evidence is undisputed that Hubbard's letter was a canned letter produced from Cessna's stock promotional correspondence. Thus, even if that letter and the accompanying materials were sent to Mikelsons in response to his inquiries,[5] there is no evidence that *any* term in the letter was written to address Mikelsons' professed requirement that the CitationJet have a range in excess of the Citation I's range at all payload configurations. There is, in short, no basis for attributing to Hubbard's "more range" representation the kind of particularized meaning that the district court found it to have.

We are left, then, with Mikelsons' unilateral expectation, based on the pre-contract conversations with Cessna representatives that the district court found to have occurred, that the new jet would have more range than the Citation I at all payloads. Given the circumstances of this case, this is not enough to overcome the plain terms of the purchase agreement eschewing any and all such extrinsic terms.

III.

It is important to recall where our analysis began. The parol evidence rule bars evidence of extrinsic terms where the parties intended for a particular document to embody their complete agreement. The purchase agreement that Cessna and Betaco signed suggests on its face that the parties did intend for that document to represent the sole and exclusive agreement between them: the agreement contained an integration clause, and it also disclaimed any warranties beyond those expressly incorporated into the agreement. These provisions were neither hidden nor incomprehensible. Mikelsons read and understood them before signing the contract.

The question, then, is whether the evidence Betaco adduced on remand is sufficient to overcome the presumption that the contract meant what it said, and that no terms not expressly included within the purchase agreement were made part of the bargain. It is far from sufficient. Although we accept, as we must, the district court's finding that Mikelsons had one or more conversations with Cessna representatives in which he was assured that the CitationJet would have more range than the Citation I, there is a paucity of evidence indicating that the parties shared an intent to make any such representation a part of their bargain. Hubbard's representation that the CitationJet would have "more range" than its predecessor came in the form of a standard promotional letter sent to countless other prospective purchasers. Moreover, if one attributes to "more range" the meaning that phrase typically carries in the aviation industry—more range at gross takeoff weight with a full load of fuel—it was wholly duplicative of the purchase agreement, which specified that the CitationJet would have a range of 1,500 nautical miles at that payload configuration, a range concededly greater than the range of the Citation I. Only if one broadens the meaning of "more range" to connote more range at *all* payloads does that term add anything to the purchase agreement, and yet there is

not in any way clarify under what payload configurations the CitationJet was to outperform the Citation I. Moreover, Cessna's belief that the range of the new jet would exceed that of the Citation I in all instances sheds no light on what Cessna had agreed to *warrant* in the contract. It does not strike us unusual that a reputable manufacturer would expect and intend for its product to perform beyond its warranted specifications; but the manufacturer's confidence in its product alone does not give rise to a contractual obligation.

5. They were sent to Hubbard by express mail, with Mikelsons' name and address, as well as a price and delivery date, already filled in on the purchase agreement.

no evidence that that is what Cessna understood the "more range" reference in Hubbard's letter to mean.

At bottom, what Betaco has attempted to do is to retroactively make part of its bargain with Cessna its own expectations of the aircraft in direct contravention of the terms of the written agreement it signed. This is what the parol evidence rule classically forbids. The district court was in error in concluding that the written agreement was not fully integrated and in permitting extrinsic evidence of an additional term, and accordingly the jury's verdict in favor of Betaco for breach of that term cannot stand.

IV.

The district court's finding that the written purchase agreement was not fully integrated, and that proof of an extrinsic term was therefore permissible, is reversed and the case is remanded with directions to vacate the jury's verdict in favor of Betaco on Count II of the complaint and to enter final judgment in favor of Cessna on that count.

REVERSED AND REMANDED.

Jimmy Ray PITSONBARGER, Petitioner–Appellant,

v.

Richard GRAMLEY, Respondent–Appellee.

No. 95–3912.

United States Court of Appeals, Seventh Circuit.

Argued Sept. 5, 1996.

Decided Dec. 19, 1996.

Order Denying Rehearing Feb. 20, 1997.

Following affirmance, 142 Ill.2d 353, 154 Ill.Dec. 562, 568 N.E.2d 783, of his murder convictions and death sentence, petitioner sought federal habeas corpus relief. The United States District Court for the Central District of Illinois, Joe Billy McDade, J., denied petition. Petitioner appealed. The Court of Appeals, Diane P. Wood, Circuit Judge, held that: (1) petitioner's ineffective assistance of counsel claim regarding psychotropic medication was procedurally defaulted; (2) Executive Agreement of Governors of Illinois, Missouri, and Nevada, was valid; (3) petitioner did not have right under Interstate Agreement on Detainers Act (IAD) to choose order in which he would serve his sentences; (4) petitioner's claim that intrajury conversation violated his right to impartial jury was procedurally defaulted; (5) trial court properly dismissed three prospective jurors for cause; (6) trial court's failure to dismiss prospective juror for cause did not deprive petitioner of his right to impartial jury; (7) evidence that petitioner had engaged in "window peeping" and public indecency in the past was admissible; (8) state court did not unreasonably apply clearly established federal law as determined by the United States Supreme Court in rejecting defendant's claim that eligibility phase of his sentencing hearing was prejudiced by improper introduction of victim impact statements; (9) petitioner's claim that prosecutor's closing argument during eligibility stage of sentencing hearing violated his rights to due process was procedurally defaulted; (10) state court did not unreasonably apply clearly established federal law as determined by the United States Supreme Court in rejecting defendant's claim that prosecutor's argument at conclusion of second stage of sentencing hearing violated his right to fair trial; and (11) petitioner was not entitled to relief based on claim that counsel had conflict of interest.

Affirmed.

1. Habeas Corpus ⇐765.1

On appeal of habeas corpus action, Court of Appeals reviews legal determinations of state courts de novo. 28 U.S.C.A. § 2254(d)(1, 2).

2. Habeas Corpus ⇐768

Factual determinations made by state courts are presumed to be correct in federal habeas action; this presumption may be rebutted only by clear and convincing evidence. 28 U.S.C.A. § 2254(e)(1).