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THE most important thing happening to the law of contracts continues to be the emergence of the American Law Institute's Restatement (Second), Contracts, especially as it reflects the influence of the Uniform Commercial Code. Although no new portions of the Restatement (Second) were approved during 1966, the extent of the changes made by Tentative Drafts Nos. 1 and 2 is still in the process of becoming apparent. This article will be largely confined to a discussion of recent cases that illustrate areas in which the Restatement (Second) is apt to accelerate (if not create) a change of attitude. Whether the "restatement" device is an appropriate means of alerting the bench and bar to the potential for change inherent in the Uniform Commercial Code has been questioned; perhaps the authority of the Restatement (Second) will indeed be lessened as a result. If so, this is perhaps not too high a price to pay for a more widespread adoption of Code philosophy than could be accomplished with a less prestigious educational tool.

I

CONSIDERATION


Although the original Restatement, Contracts contained no specific requirement of "mutuality of obligation," it was nevertheless possible for Professor Corbin to state, writing twenty-five years later, that the necessity

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3. This requirement is usually stated in the form, "Both parties to a contract must be bound or neither is bound." See 1A Corbin, Contracts § 152 (1963). The closest the first Restatement came to affirming this principle was to state that (subject to specified exceptions) a nonbinding promise was insufficient consideration to bind a
for such mutuality "is one of the most commonly repeated statements known to the law of contract." Tentative Draft No. 2 of the Restatement (Second) has now taken a more forceful position on the point: Section 81 provides that "if the requirement of consideration is met, there is no additional requirement of . . . 'mutuality of obligation.'" In light of such apparent need to redefine or at least clarify the doctrine of consideration in this respect, it is perhaps useful to examine some of the recent cases which raise problems of "lack of mutuality" in one form or another. Although some decisions can be explained on different grounds, or skirt the issue, others raise and decide the issue squarely (and, at least in some cases, correctly).

In Commercial Asphalt, Inc. v. Smith, plaintiff's predecessors, Mr. and Mrs. Koster, had entered into an agreement granting defendants the right for a twenty-year period to pump and remove sand from the Kosters' land, in exchange for a payment of five cents per ton of sand removed. The agreement provided for a rental payment of $100 per month to the Kosters "if pumping operations ceased for a period of sixty days or longer," however, it also gave defendant lessees the right to terminate at any time on notice followed by removal of their equipment from the Kosters' land. The defendants, pursuant to their agreement, removed sand from

4. 1 Corbin, Contracts § 152, at 496 (1950). In the 1963 version of this section, Professor Corbin was able (probably in large part due to the success of the earlier version) to change the quoted portion to read: "That such mutuality is necessary has been a commonly repeated statement." IA Corbin, Contracts § 152, at 2 (1963).

5. Also disclaimed are any additional requirements of benefit/detriment or exchange equivalence. Restatement (Second), Contracts § 81 (Tent. Draft No. 2, April 30, 1965).

6. If there is any such requirement of mutuality of obligation, it apparently exists as an implication from, or a corollary of, the general requirements of consideration. See Williston, The Effect of One Void Promise in a Bilateral Agreement, 25 Colum. L. Rev. 857 (1925); 1A Corbin, Contracts § 12 (1963).

7. In Schaffer v. Wolbe, 113 Ga. App. 448, 148 S.E.2d 437 (1966), a contract to pay a commission for sales of real estate, allegedly void for lack of mutuality, was held to have become enforceable by reason of full performance on plaintiff's part—in effect, a completed "unilateral contract" (another obsolete term—see Restatement (Second), Contracts § 12, Reporter's Note (Tent. Draft No. 1, April 13, 1964)).

8. In Dallas County Water Control & Imp. Dist. v. Ingram, 395 S.W.2d 834 (Tex. Civ. App. 1965), an employee was permitted to sue on a five-year contract of employment which reserved to him the right to "cancel" without liability. The issue of mutuality was raised but not effectively disposed of.


10. Id. at 165, 409 P.2d at 797. There is no indication that this provision applied to the period before any pumping operations had commenced; apparently, it did not. Id. at 166, 409 P.2d at 798. ("Appellee suggests that the lessees could have walked away without making any attempt to perform. . . . There is merit to appellee's contention.")
the land for eleven years, and apparently fully complied with their obligations. Then the plaintiff purchased the land from the Kosters, and brought an action to have the agreement declared invalid and to have defendants ordered to remove their equipment from the premises. The trial court gave judgment for the plaintiff, based upon the conclusion that because the defendant could terminate at will, therefore the plaintiffs as a matter of law could also terminate at will. On appeal to the Supreme Court of Kansas, judgment was reversed, on the ground that part performance had cured the alleged defect of lack of mutuality, as well as furnishing consideration for the lessors' promise.

The court's decision is correct, and it avoids the baleful effects often resulting from the mutuality doctrine in cases where the maker of a promise which is not by its term "illusory," or nonbinding, seeks to avoid his duty of performance by relying on some claimed defect in the promise made by the other party. However, the case does suggest some questions about the permissible scope of "nonmutuality" under the revised Restatement.

Two similar but distinct problems are raised by the agreement in the Commercial Asphalt case. First, there was apparently no contractually-imposed obligation on the lessees' part to begin to perform at all; they need not have produced, or paid for, any sand whatever. This being so, it would appear that under either version of the Restatement the lessors could successfully have claimed to be not bound in the absence of some act of performance (or, perhaps, substantial reliance) on the lessees' part, on the theory that the only consideration for the lessors' promise was a nonbinding, and thus insufficient, promise in return.

Once performance is begun, no objection to enforceability should be available on the ground that such commencement was not mandatory. However, an additional objection remains—the lessees still may terminate at will. Does this destroy enforceability by the lessees?

A partial answer can be found in the obligation on the lessees' part to remove their equipment upon termination. A conventional "detrimental alternative" thus exists, and even under established principles would be sufficient to bind the lessors. What if that factor were absent, however,

11. Plaintiff admitted having been aware of defendant's agreement before purchasing the land; it had relied on counsel's opinion that the agreement was invalid. Id. at 165, 409 P.2d at 797.
12. See note 10 supra.
13. Compare Restatement, Contracts §§ 79, 80 (1932) and Restatement (Second), Contracts § 79, comment a (Tent. Draft No. 2, April 30, 1965). This remains the rule despite the adoption by the Restatement (Second) of the "bargain theory" of consideration (§ 75); however, as even Professor Williston recognized, a promise which is frankly "illusory" can nonetheless be "bargained for." 1 Williston, Contracts § 103B (rev. ed. 1936).
14. Restatement (Second), Contracts § 79(b) (Tent. Draft No. 2, April 30, 1965) suggests this result; §§ 75 and 76 presumably meet the "consideration" point and § 81 negates any additional requirement of "mutuality."
15. Restatement, Contracts § 79 (1932).
and termination by the lessees were truly a "nondetrimental alternative"—should the lessors (or their successor) then be free of any prospective obligation?

This writer would say no, on the ground that an executed part performance is sufficient consideration to bind the lessors, so that consideration no longer need be found in a mere promise, "illusory" or not. Whether this view is shared by the court in the Commercial Asphalt case is not clear.\textsuperscript{16} It is probably the view of Professor Corbin.\textsuperscript{17} It is arguably the view of the Restatement (Second), although unfortunately this is ascertainable only by a process of deduction from the interaction of sections 81 (especially comment d) and 76.\textsuperscript{18} Applied to its fullest extent, this view would probably change the result in even the "open-ended offer" case,\textsuperscript{19} wherever any quantity has actually been ordered in response to the offer.\textsuperscript{20} If such is the intent, it would seem that the Restatement (Second) could have been a bit more explicit;\textsuperscript{21} if such is not the intent, then it is not clear just what is the intended effect of the new disavowal of "mutuality of obligation."\textsuperscript{22}

As Professor Corbin has pointed out, the law relating to "illusory promises" has been developed in cases where the maker of an arguably "illusory" promise seeks to enforce the other party's nonillusory one, and the defense is lack of consideration.\textsuperscript{23} In an effort to avoid invalidating such agreements, the courts have developed techniques of implying standards or additional promises sufficient to render the attacked promise not illusory.

\textsuperscript{16} 196 Kan. at 167-68, 409 P.2d at 799. A seemingly contra federal court decision, holding an agreement to haul poultry unenforceable both for lack of mutuality and for uncertainty, was recently affirmed. Poultry Haulers, Inc. v. Pillsbury Co., 247 F. Supp. 556 (N.D. Ala. 1964), aff'd per curiam, 353 F.2d 538 (5th Cir. 1965). The decision was based on Alabama law, although a recent Alabama opinion suggests a less stringent requirement of mutuality than the federal court imposed. D. B. Clayton & Associates v. McNaughton, 182 So. 2d 890 (Ala. 1966).

\textsuperscript{17} 1A Corbin, Contracts §§ 157, 160-67 (1963).

\textsuperscript{18} Perhaps the final sentence of comment c to § 79 is meant to cover this situation.

\textsuperscript{19} The typical result is that the offer is regarded as a "standing offer" for a series of contracts, and each order binds the offeror to supply only the quantity so ordered. The "standing offer," being not binding, is revocable at will. 1A Corbin, Contracts § 157 (1963). See, e.g., Wickham & Burion Coal Co. v. Farmers' Lumber Co., 189 Iowa 1183, 179 N.W. 417 (1920). Of course, under the Uniform Commercial Code or similar "firm-offer" statute, such an offer may be binding at once, but only for a limited time. Uniform Commercial Code § 2-205 [1962 official text hereinafter cited as UCC].

\textsuperscript{20} Cf. the discussion in 1A Corbin, Contracts § 157, at 46-49 (1963).

\textsuperscript{21} Comment f to § 81, which discusses the absence of any mutuality requirement, is unaccompanied by any illustrations, and has not even been supplied with a reporter's note.

\textsuperscript{22} If the attitude toward these cases advocated above is approved, a somewhat greater sensitivity to the possible presence of duress or unconscionability may be necessary where a long-term promise on one side is claimed to be binding because of a relatively insignificant part performance on the other. See, e.g., Bailey v. King, 240 Ark. 245, 398 S.W.2d 906, 908 (1966), discussing the enforceability of a covenant not to compete appended to an employment contract.

\textsuperscript{23} 1 Corbin, Contracts § 145, at 632-33 (1963).
after all. Should this approach also be applied in cases where the possibly illusory promise is the one sought to be enforced?

In Hogan v. Wright, Hogan, an attorney, had succeeded in securing a $75,000 settlement in favor of his client, Wright, on a claimed breach by the seller of a contract to supply steel for a bridge to be constructed by Wright for the State of Ohio. In a letter to Wright fixing his fee at $15,000 (which was duly paid), Hogan offered to prepare and submit Wright’s claim to the Ohio Sundry Claims Board for no additional charge (the claim being based largely on information already prepared by Hogan in prosecuting the contract claim). However, Hogan went on to stipulate that Wright should pay to Hogan out of any recovery “a percentage figure acceptable to you [Wright].” Wright agreed, and Hogan prepared and filed the claim, on which the State eventually allowed a recovery of over $137,000. Although Hogan’s letter to Wright had also pointed out that his customary fee in such cases was $2,500 against twenty-five per cent of the recovery, Wright suggested a fee of $2,000. In ruling on Hogan’s suit to recover the claimed reasonable value of his services, a federal district court held that Wright’s offer of $2,000 was so low as to constitute bad faith as a matter of law, and ruled that Wright was bound to pay Hogan over $27,000. On appeal, the Court of Appeals for the Sixth Circuit reversed, holding that Hogan was not necessarily entitled to the reasonable value of his services, and that Wright’s offer of $2,000 did not amount to bad faith as a matter of law, given the circumstances and the respective positions of the parties.

The court correctly eschews the temptation to remake the parties’ contract. As noted above, even an illusory promise may be bargained for; if correctly understood by the promisee, it should not thereafter be enforced beyond its terms merely to restore some desired element of mutuality or equivalence of exchange. The situation is different, of course, if fraud, duress or clear unconscionability should infect the agreement, but Hogan seems to present as clear a case as possible for the absence of such factors—the offer to receive an insubstantial promise was made by an attorney, and its phrasing was chosen by him.

This being the case, just what is the extent of Wright’s enforceable obligation? The opinion by Circuit Judge Celebrezze seems to imply that the agreement should be interpreted to require “good faith” on Wright’s part, but just what is it that Wright is bound “in good faith” to do? Is

25. 356 F.2d 595 (6th Cir. 1966).
26. Id. at 596.
27. At an earlier stage, the case had been decided in the District Court on a purely quantum meruit basis; the Court of Appeals then remanded for retrial on the issue of the existence of a contract. Hogan v. Wright, 322 F.2d 83 (6th Cir. 1963).
28. See note 13 supra.
29. Cf. UCC § 1-203.
he free to fix any amount at all, or must he fix the fee at the amount he "in good faith" believes to be the reasonable worth of Hogan's services?

The latter is certainly arguable, and would clearly be a nonillusory promise.\textsuperscript{30} It may also be argued, however, that Wright is free to fix any amount he chooses, down to zero (or nearly), if this is what he "in good faith" understood Hogan's offer to mean—certainly the words of the offer support this interpretation. This would amount to a substantially "illusory" (i.e., "nonbinding" by its terms) promise on Wright's part, and suggests the possible tactic for Hogan of claiming that no binding contract was ever made, with a result that he should be compensated for the reasonable value of his services on a quantum meruit basis.\textsuperscript{31}

This is more ingenious than persuasive, however. If a promise was truly understood by the promisee (or should have been so understood) as imposing no enforceable obligation, then performance upon the strength thereof is not an unjust enrichment of the promisor, even if never compensated, because it was essentially a gamble on the promisee's part to proceed with performance at all.\textsuperscript{32} This is not to deny that an illusory promise may be made in a deceptive or fraudulent manner, or in circumstances such that reliance deserving of protection should justly be expected,\textsuperscript{33} but these factors must be isolated and dealt with as such; in their absence even an illusory bargain is entitled to the respect that any other bona fide bargain customarily deserves, and receives.\textsuperscript{34}

II

PROMISSORY ESTOPPEL


It seems unlikely that any single section of the original \textit{Restatement, Contracts} has been more influential in shaping both the actual results

\begin{itemize}
\item \textsuperscript{31} It should be noted that such an "offensive" use of the "illusory" promise is unusual; the typical case is one of "defensive" use against plaintiff, who made the promise now attacked as illusory. See text accompanying note 23 supra.
\item \textsuperscript{32} See \textit{Restatement, Restitution § 107 (1937)}, quoted by Judge Celebrezze in his opinion in the Hogan case, 356 F.2d 595, 598.
\item \textsuperscript{33} \textit{Spooner v. Reserve Life Ins. Co.}, 47 Wash. 2d 454, 287 P.2d 735 (1955), is an example of a case coming close to the line; from the vantage point of a mere reader of the appellate court's opinion, it is impossible to tell whether it was correctly decided.
\item \textsuperscript{34} On this score, the author would disagree with the recent decision in \textit{Allen D. Shadron, Inc. v. Cole}, 101 Ariz. 122, 416 P.2d 555 (1966), in which a completely executory "nonbinding" (by its terms) promise to pay a bonus was enforced on a mere showing that the promisor had decided to pay it, then changed his mind. No reliance by the plaintiff is apparent, and the court's attempt to turn a simple decision to pay or not into some sort of "election," binding as soon as made, is not persuasive.
\end{itemize}
of decided cases and the articulated reasons therefor than section 90, permitting enforcement of a promise which induces definite and substantial reliance, where injustice cannot be otherwise avoided—the well-known principle of “promissory estoppel” (although section 90 does not use that term). Although it was originally thought by some to be confined to gratuitous promises (the illustrations to section 90 are consistent with this approach), it has long since been clear that the same principle may operate to justify a remedy in a commercial situation where an offer for a contract has foreseeably induced reliance by the offeree which, although “unbargained for,” is yet felt to be so substantial that justice will not now permit revocation of the offer.

Perhaps the best example of this evolution is the celebrated series of construction-bidding cases, in which the clear principle has emerged that a general contractor who has not yet accepted a subcontractor’s bid may nonetheless have caused that bid to be at least temporarily irrevocable by his reliance thereon in computing and submitting his bid for the general contract. A recent case so holding in the Appellate Division of New Jersey’s Superior Court is noteworthy in two respects: It is apparently the first holding in that state to directly apply the doctrine of promissory estoppel, and it suggests (in remanding for retrial) that the estoppel may be set up despite the inapplicability of the “firm offer” provision of the Uniform Commercial Code.


37. Id. at 74-77, 216 A.2d at 250.

38. UCC § 2-205. Without deciding whether the offer dealt with “goods,” the court ruled that it gave no assurance it would be held open, as required by § 2-205. The court was careful to point out that no decision was being made on the question of whether the UCC precludes reliance on an offer not in conformance with § 2-205, although its opinion seems to imply a negative answer to that question. E. A. Coronis Associates v. M. Gordon Constr. Co., 90 N.J. Super. 69, 79-80, 216 A.2d 246, 253 (1966). It would appear doubtful that § 2-205 was intended to so restrict the type of offer reliance on which might justifiably be protected; it appears rather to be an attempt to bring the law into line with existing “good” business practice respecting ostensibly “firm” offers. The comments to § 2-205 indicate that the section has no effect on oral offers or on long-term options supported by consideration, and its tenor seems to belie any side effect of changing the law as to the effect of reliance on an otherwise revocable offer.

Two other recent cases involved similar actions by a general contractor against a subcontractor. Recovery was permitted in Jaybe Constr. Co. v. Beco, Inc., 3 Conn. Cir. 406, 216 A.2d 208 (1965), but apparently on a strict contract theory (although the court cites Drennan v. Star Paving Co., 51 Cal. 2d 409, 333 P.2d 757 (1958)). In C. H. Leavell & Co. v. Grafe & Associates, Inc., 414 P.2d 873 (Idaho 1966), the principle of promissory estoppel was approved, but recovery was denied on the ground that continued negotiations after the award of the general contract indicated insufficient agreement on the terms of defendant’s bid to permit enforcement based on reliance.
Two recent cases, from Wisconsin and Texas, suggest that the principle of section 90 is undergoing another expansion potentially as significant as its extension to commercial situations; the revisions made in that section by the Restatement (Second) should do a great deal to encourage this expansion.

The earlier case is *Hoffman v. Red Owl Stores, Inc.*, a 1965 Wisconsin decision. In this case Hoffman, a bakery operator, sought to obtain from defendant a franchise to open a grocery supermarket. He had $18,000 of his own to invest in the venture, which amount defendant assured him would suffice. Relying on defendant's assurances that no problems would be met in securing a franchise, Hoffman, on defendant's advice, sold his bakery (at a $2,000 loss) and, to obtain experience, purchased and operated a small grocery store, which he sold at a small profit when defendant advised him he should (which was just before the profitable summer tourist season in Wisconsin). Hoffman also took an option on a lot in the town in which he expected to be licensed to operate a Red Owl store, and incurred various moving expenses. The negotiations finally terminated when defendant increased the amount of capital to be supplied by Hoffman and then rejected the form in which he proposed to supply it. Despite the failure of the parties to reach agreement on this point, or to work out many other details of their projected arrangement, the trial court gave judgment for Hoffman for several items of expense incurred in reliance on defendant's representations. On appeal, the Wisconsin Supreme Court affirmed, for the first time adopting the principle of promissory estoppel as set forth in section 90.40

In *Wheeler v. White*, plaintiff Wheeler owned a plot of land which he wished to develop with a commercial building. He entered into a written agreement with White wherein the defendant promised to obtain or furnish within six months a $70,000 loan to Wheeler for use in building on the latter's land.42 Relying on White's assurance that the money would be available, Wheeler razed the existing building and prepared the site for construction. White then advised Wheeler that no loan would be forthcoming. Wheeler was unable to obtain a loan elsewhere, and sued for damages suffered in reliance on the agreement with White, including architectural fees paid and loss of market value of buildings destroyed. Relying on a 1962 decision of the Texas Supreme Court,43 the district court dismissed the suit, holding that no enforceable contract existed between Wheeler and White because of the vagueness and uncertainty of the provisions relating to payment of interest on the loan. The

40. Id. at 694, 133 N.W.2d at 273.
41. 398 S.W.2d 93 (Tex. 1965).
42. White was to receive a commission for obtaining the loan, plus a right to secure tenants for the proposed building, also on commission. Id. at 94.
43. Bryant v. Clark, 163 Tex. 596, 358 S.W.2d 614 (1962).
Texas Court of Civil Appeals affirmed the dismissal, but on appeal to the Texas Supreme Court the decision was reversed and the case remanded for trial. The court held that although the trial court had correctly ruled that no enforceable contract had been made, the plaintiff had nevertheless succeeded in pleading a cause of action based on promissory estoppel, and could on a proper showing recover his damages suffered in reliance on the agreement with White.

For years, courts and text-writers have struggled with the requirement that a contract, to be enforceable, must be certain in its terms. Many decisions have denied enforcement for vagueness of one kind or another despite the clear intention of the parties to enter into a final agreement and their evident belief that they had done so. Sometimes the holding has been merely that the contract was too vague to be specifically enforced, while in others it has taken the form of a more sweeping pronouncement (which may or may not have been required, in light of the prayer for relief) that no contract existed at all.

In an effort to overcome the restrictive effect of case law in this area the sales article of the Uniform Commercial Code incorporates an important principle: "Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy." This principle has now been reflected in the Restatement (Second).

Applying this test to the Wheeler case, it seems clear that decision there could have properly been rested—as Justice Greenhill argued in his concurring opinion—on the ground that a contract did exist which was at least certain enough to justify imposition of the damage remedy sought. However, the Texas court in choosing to base its decision on the ground of promissory estoppel has indicated strong approval of the idea

46. Justice Greenhill, who concurred on other grounds (see text accompanying notes 52-53, infra), did not expressly disapprove the majority's view of promissory estoppel.
47. "[A]ll that is required to achieve justice is to put the promisee in the position he would have been in had he not acted in reliance upon the promise." Id. at 97.
49. See generally 1 Corbin, Contracts §§ 95-102 (1963); 5A Corbin, Contracts § 1174 (1964).
50. UCC § 2-204(3) (emphasis supplied).
52. Wheeler v. White, 398 S.W.2d 93, 97 (Tex. 1966).
53. As Justice Greenhill points out, this could have been done without overruling Bryant v. Clark, 163 Tex. 596, 358 S.W.2d 614 (1962).
that an estoppel may be used to circumvent an excessive vagueness in the agreement where a remedy based on reliance is clearly called for.\textsuperscript{54}

In the \textit{Hoffman} case something even more far-reaching is happening. Whereas in \textit{Wheeler} the negotiations were complete, and an agreement apparently concluded, the parties in \textit{Hoffman} were actively negotiating during most of the period when the plaintiff's now-complained-of reliance was taking place, and in fact they never did reach an agreement that even they regarded as final and complete. It is clear that the Wisconsin court has not simply relied on estoppel to overcome a claimed uncertainty of terms; it has rather created a new collateral obligation to bargain in good faith, and imposed it on a party who too actively encouraged reliance by the other on the represented virtual certainty that an agreement would be reached.\textsuperscript{55}

Both the \textit{Hoffman} and \textit{Wheeler} decisions may be more readily followed by other courts as a result of the proposed revision of section 90 in the \textit{Restatement (Second)}. Dispelling earlier uncertainty,\textsuperscript{56} the \textit{Restatement} would now clearly permit enforcing the promise in question only to the extent necessary to avoid injustice, thus permitting the court to restrict the plaintiff to reliance damages rather than requiring that it give him the full benefit of his supposed bargain.\textsuperscript{57} This is the approach of the court in both \textit{Hoffman} and \textit{Wheeler—in fact retrial on the damage issue in \textit{Hoffman}}.

\textsuperscript{54} Two cases somewhat comparable on their facts to the Hoffman case are Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948) (cited by the court in both Hoffman and Wheeler), and Chrysler Corp. v. Quimby, 51 Del. 264, 295, 144 A.2d 123, 885 (1958) (cited by the court in Hoffman). Each case involved a claim based on failure to grant a retail sales franchise. The cases are distinguishable, at least from Hoffman, in that in each it appears that an ostensibly final bargain bad been arrived at, or at least that the promisee thought that no substantial terms remained to be worked out.

\textsuperscript{55} See Note, 51 Cornell L.Q. 351 (1966).

\textsuperscript{56} See Note, 13 Vand. L. Rev. 705 (1960), describing the controversy, and favoring Williston's view that full contract damages should be available in every case.

\textsuperscript{57} Restatement (Second), Contracts § 90, comment e (Tent. Draft No. 2, April 30, 1965). In Goodman v. Dicker, 169 F.2d 684 (D.C. Cir. 1948), discussed supra at note 54, only reliance damages were given, and lost profit was specifically disallowed as an item of recovery, with no real explanation by the court. In Chrysler Corp. v. Quimby, 51 Del. 264, 295, 144 A.2d 123, 885 (1958), discussed supra at note 54, full contract damages were given. One possible reason for the distinction is the fact that the franchise in Dicker, if awarded, would have been terminable by the defendant at will, while in Chrysler the dealer's franchise would have been terminable only on ninety days' notice. The Restatement (Second) bases illustrations 12 and 13 to § 90 on these two cases, approving their differing results on the issue of lost profits, but obliterating the above possible ground of distinction. It is difficult to tell what the Restatement (Second) does regard as the distinguishing feature of the two cases; apparently it is the fact that in Chrysler the plaintiff as part of his reliance made a payment which discharged a "moral" (not a legal) obligation of defendant, thus resulting in a species of "unjust enrichment" (although this payment would of course have been compensated even if only reliance damages were awarded). Actually, the court in the Chrysler case made it very clear that the lost profits were granted because of, and limited by, the ninety-day termination clause. See Chrysler Corp. v. Quimby, supra at 283-84, 296-97, 144 A.2d at 134, 885, 886-87 (1958).
Was ordered solely to avoid giving plaintiff any damages based on lost profits from the grocery business which he purchased and then sold on defendant’s advice.\textsuperscript{58} It appears that a court might be unwilling in the \textit{Hoffman} situation to grant a remedy based on full expectation damages even if they could be proved with sufficient certainty; this revision of section 90 may encourage its use in such situations.

However, certain caution is called for in applying the approach of the \textit{Hoffman} case to an abortive business venture. While good faith is to be encouraged as a general rule, and may be appropriately regarded as built into any concluded agreement which deserves the legal appellation “contract,” it is far from clear that in every business situation the mere commencement of negotiations should serve as grounds for implying an enforceable obligation to continue to bargain in good faith until agreement is reached. Indeed, it is arguable that until a recognizably final and complete bargain is struck, the ordinary businessman regards himself—and his negotiating opposite number—as completely free legally (if not morally) to withdraw \textit{for any reason}. In such a situation, reliance by one party upon the on-going negotiations—even if foreseeable—is not likely to be deserving of legal protection. Only in the presence of substantial reliance which is actively encouraged by the other party, or perhaps in cases of extreme business naiveté known to the other party, should a legal remedy be available to the disappointed party.\textsuperscript{59}

\section*{III

\textbf{Trade Usage}


As has been noted above,\textsuperscript{60} a likely result of the utilization of promissory estoppel as the justification for holding a promise enforceable (specifically or otherwise) is an ensuing relationship of “nonmutuality”—i.e., only one party will be bound to a promise; the other may have commenced to perform, or to prepare for performance, in return but will not necessarily be bound to complete performance.\textsuperscript{61}

Such a situation is not necessarily a socially desirable one in all cases.

\textsuperscript{58} It could of course be argued that damages based on those profits would have been in the nature of reliance damages, but since the business was initially purchased at defendant’s instigation the plaintiff did not really lose the profits as a result of reliance on defendant’s representations—absent any acts by defendant, plaintiff would not have realized this profit anyway.

\textsuperscript{59} Cf. \textit{Gay v. United States}, 356 F.2d 516, 524-25 (Ct. Cl. 1965) (denying to a trustee for shareholders any recovery of profits allegedly lost as a result of the government’s failure to enter into a contract to purchase uranium ore).

\textsuperscript{60} See note 3 supra.

\textsuperscript{61} Of course specific enforcement of a promise may be conditioned on the furnishing of a return performance, if one was contemplated.
even if one does agree that in general no requirement of "mutuality of obligation" does or should exist. In the construction industry, for example, more than one writer has pointed out the likelihood that an existing commercial imbalance (with resulting opportunity for oppressive conduct) is probably increased, rather than reduced, by the use of promissory estoppel in some cases to bind the subcontractor to the general contractor without the general contractor being bound in return. Some courts of course simply refuse to take the first step of binding the subcontractor in this situation, but an even harder step is to find that a bilateral contract, binding both parties, has been formed.

In Industrial Electric-Seattle, Inc. v. Bosko, the Supreme Court of Washington has now taken this step. Defendant Bosko, a general contractor, had received a bid from the plaintiff subcontractor which defendant apparently used in preparing his bid on the general contract. After defendant was awarded the general contract, he and plaintiff communicated with respect to plaintiff performing an additional part of the work not covered by its original bid. Negotiations on the issue broke down and plaintiff withdrew its latter offer, whereupon defendant took the position that he was not bound to engage plaintiff as subcontractor on even that part of the job originally quoted. In its suit for breach of contract, plaintiff was permitted to introduce evidence that a custom existed in the construction business in Seattle that if a general contractor obtained and used a subcontractor's bid and thereafter received the main contract, the former was then bound to use the latter's services in performing the main contract. On appeal, the decision was affirmed, the court holding that trade usage could properly be admitted and considered as one of the surrounding circumstances to determine whether in fact a contract had been concluded between the parties.

There seems little doubt that trade usage may be relied upon to interpret the terms of a contract, or to supply one or more terms which

63. Although many courts have denied recovery to a complaining subcontractor for various reasons, it appears that few are in agreement with Judge Hand's holding, in James Baird Co. v. Gimbel Bros., Inc., 64 F.2d 344 (2d Cir. 1933), that promissory estoppel simply has no place in this area. See generally Schultz, supra note 62, at 240-56.
64. See, e.g., Williams v. Favret, 161 F.2d 822 (5th Cir. 1947), where the general contractor was not bound despite a seeming conditional acceptance on his part.
66. In the Bosko case the parties had never dealt together before, so the strength of the decision is not diluted by the possibility that a "course of dealing," rather than "trade usage," was involved. Cf. UCC § 1-205.
67. "Usage" is distinct in law from "custom," and is viewed as affecting an agreement by virtue of being (unless negated) an implied part thereof, rather than operating as an extrinsic factor, which "custom"—being in effect a rule of law—would do. 5 Williston, Contracts § 649 (Jaeger ed. 1961).
68. Restatement, Contracts § 246(a), Illustrations 1-7 (1932).
have been omitted. In a proper case, evidence of trade usage may properly even overcome what a court would probably regard as the contrary "plain meaning" of the agreement.

However, there is some authority for the proposition that trade usage may not be used to prove the existence of a contract—only to interpret one already otherwise established. The original Restatement, Contracts does indicate that proof of usage may show that a contract does not exist where otherwise one would have been established; it does not express a view on the reverse situation, however. Even the Uniform Commercial Code, which tries in general to modernize the law relating to trade usage, is equivocal on this point.

The court in Bosko also had to overcome two of its own prior opinions—one only ten years old, the other only six weeks—which appear prima facie to be in point, and contra to the result in Bosko. How well the court succeeded in distinguishing the two cases is a matter of opinion, but their restrictive effect on its opinion appears to be slight, reflected only in the caveat that although custom may be considered as one of the

69. Restatement, Contracts § 246(b), illustrations 8-11 (1932).
70. See, e.g., Gholson, Byars & Holmes Constr. Co. v. United States, 351 F.2d 987, 998-1001 (Ct. Cl. 1965) ("previously painted surfaces" does not include surfaces previously covered with baked enamel, despite the fact that "enamel is a paint").
71. See 5 Williston, Contracts § 651, n.15 (Jaeger ed. 1961). This has apparently been the rule in construction bidding cases. Schultz, supra note 62, at 252-56.
72. Restatement, Contracts § 249, illustration 3 (1932).
73. Restatement, Contracts § 249, illustration 2 (1932), states that usage cannot overcome lack of consideration; this may perhaps suggest that it also cannot be relied on to overcome the lack of an overt manifestation of acceptance, but it certainly does not compel that conclusion. Although the Restatement (Second) has not yet reached §§ 245-49, there is already strong indication that trade usage will be accorded a larger role in contract formation. § 72(1) (c) formerly validated "acceptance by silence" in cases where the offeree's silence would be so understood because of "previous dealings or otherwise"; this subsection has been slightly revised and a new comment added to make it clear that silence can so operate by "usage of trade." Restatement (Second), Contracts § 72, comment d (Tent. Draft No. 1, April 13, 1964).
75. UCC § 1-205(3), (5) indicates that usage may "give particular meaning to," "supplement" and "qualify" an "agreement," and may "be used in interpreting the agreement." Section 1-201(3) defines "agreement" as "the bargain of the parties in fact as found in their language or by implication from other circumstances including . . . usage of trade . . . ." Whether usage can be used to supply the essential requisite of a completed agreement—a "struck bargain"—is not completely clear, though it may have been intended.
77. The Plumbing Shop, Inc. v. Pitts, 408 P.2d 382 (Wash. 1965).
78. The Milone case still seems to this writer to be directly contra. The Plumbing Shop case is clearly distinguishable in at least one respect—usage in that case was relied on to establish sufficient certainty in the agreement, and to overcome the finding that a formal written contract was contemplated as the binding agreement; to establish the general contractor's acceptance, specific acts on his part were alleged.
surrounding circumstances in contract formation, it must not stand alone; there must be some other actions or circumstances as well. Judging from the facts given in Bosko, these other circumstances need not be very substantial, and future cases may minimize this requirement even more. The end result is apt to be a welcome expansion of the extent to which the general understanding of persons in a trade as to the binding (though not necessarily "court-enforceable") nature of their business relations at various stages is reflected in the legal characterization of those relationships.79

IV

MISCELLANEOUS

A New York lower court recently had to decide whether a woman upon attaining her majority may (in order to sue her physician in tort) disaffirm her previous consent to nonemergency surgery, where the consent was given by her as a minor emancipated by marriage.80 The court, in refusing to allow such disaffirmance, seemingly suggested a new and important limitation on the traditional disability of infants to contract, by equating emancipation with contractual freedom over all "personal" rights, without regard to any requirement that such contracts relate to "necessaries."81

Natural gas distribution companies may be hard pressed to adjust to

79. Another aspect of the relation of trade usage to the formation of a contract is the problem (often referred to as "the battle of forms") created by an "acceptance" qualified by additions, deletions or variations of terms from those of the offer. The first question is whether such a response actually does constitute an acceptance; if it does, the question then arises as to which of the various terms comprise the contract. In a recent case, a subcontractor signed and returned a proffered contract form, but coupled with it a letter referring to additional terms which had been specified in his bid, stating he assumed their omission from the written contract to be unintentional. The letter also incorporated other terms he stated had been agreed to orally. In a later suit by the general contractor alleging breach by the subcontractor, the court found there had been no meeting of the minds, and hence no contract existed, despite the fact that the subcontractor had begun performance and had received one payment. Fidelity & Deposit Co. v. Harris, 360 F.2d 402 (9th Cir. 1966). It appears that using either the approach of UCC § 2-207 or of Restatement (Second), Contracts §§ 60, 62 and 72 (Tent. Draft No. 1, April 13, 1964), the court might well have found that a contract did exist between the parties; this would appear particularly to be the result if UCC § 2-207(3) were applied. What the terms of that contract would be is not entirely clear, however, and although the revised comment a to § 60 makes it clear that § 2-207 is to serve as a general guide for decision, it appears not at all certain that the two sections will always produce the same result in a given case.


the decision of Kansas-Nebr. Natural Gas Co. v. Consumers Pub. Power Dist. Plaintiff was successor by merger to a gas supplier which had an "interruptable service" contract with defendant, by which the supplier was allowed to provide other priority customers with gas before supplying the defendant, the defendant then being entitled to receive whatever gas the supplier had available. The Supreme Court of Nebraska unanimously upheld defendant's position that the "available" amount of gas was to be measured by the total amount available to the entire merged system, not merely the amount available to the original supplier. The court properly rejected an argument based on mistake of fact, but did not consider the question of a change in circumstances not foreseen when the contract was executed. Since interruptable service contracts are widespread in the natural gas industry, future mergers of two or more gas distribution companies where each has a substantial number of interruptable service customers may pose difficult contractual problems for the merging parties.

Various forms of contractual provisions shifting liability for personal injuries came to the attention of the courts during the past year. In Anderson v. Howard Hall Co., the Alabama high court held that an injured third party had no rights under a tractor-trailer lease contract obligating the lessee to obtain liability insurance. Although the court held that plaintiff was a mere "incidental" third party beneficiary, with no rights under the lease contract, it could have avoided this result by finding that the object of requiring the lessee to obtain liability insurance was to protect the general class of injured third parties to whom the benefits of such insurance would inure. This would be consistent with the evident state policy of requiring drivers to demonstrate financial responsibility.

In four other cases, courts denied enforcement to provisions whereby an indemnitor had promised to hold an indemnitee harmless from all liability, including that caused by the latter's negligence. In Northwest Airlines, Inc. v. Alaska Airlines, Inc., the Ninth Circuit Court of Appeals held an exculpatory clause by which Alaska promised to indemnify Northwest as part of its contract for use of Northwest's airport facilities to be unenforceable, on the policy ground that Northwest by its operation of public airport facilities was charged with a duty of public service, and thus could not impose a duty of indemnification for its own negligence as a condition to their use. The court did not discuss the fact that the con-

82. 179 Neb. 687, 140 N.W.2d 10 (1966).
83. But cf. UCC § 2-305(1).
84. 278 Ala. 491, 179 So. 2d 71 (1965).
85. Ala. Code tit. 36, § 74(46) (Supp. 1965) provides that one involved in a property damage or personal injury accident must file a showing of financial responsibility. Proof of liability insurance with specified minimum coverage will satisfy the statute (§ 74(46)(c)).
86. See generally Annot., 175 A.L.R. 8 (1948).
87. 351 F.2d 253 (9th Cir. 1965), cert. denied, 383 U.S. 936 (1966).
tract was one of adhesion (although such appears to have been the case), a factor which was deemed controlling by the court in *Batson-Cook Co. v. Georgia Marble Setting Co.* In the latter case, such an indemnity clause was contained in an agreement between a contractor and a subcontractor for construction work. The superior bargaining position of the contractor was relied upon to invalidate the term of the contract which indemnified him against his own negligent acts. In a third situation, a New Jersey court held that a release given by an auto race driver to the promoters of a stock car race was not enforceable in the face of a statutory duty on defendants' part to inspect cars before the race.

The only case in which the decision invalidating an indemnification clause drew a dissent was *Union Pac. R.R. v. El Paso Natural Gas Co.* The railroad granted El Paso an easement parallel to its tracks for the laying of a pipeline. The clause in question specified certain types of possible damage and then covered damage which "in any other way whatsoever is due to or arises because of the existence of the pipe line . . . ." Union Pacific settled for $340,000 a claim by an El Paso employee injured (allegedly through the negligence of Union Pacific) while he was working on the right of way. It then sought recovery against El Paso under the agreement of indemnification. The court in denying recovery to Union Pacific relied on a general public policy against such a covenant designed to relieve the promisee of liability for his own negligence, and a corresponding rule of interpretation against such coverage unless expressly stated. A persuasive dissent pointed out that there is liability which will hold one harmless from the effects of his own negligence, and further saw no intent by Union Pacific to assume the risk of such liability for a mere $800 (the price it received for the easement). The majority's citation of the *Northwest Airlines* case seems inappropriate, in that Union Pacific's grant of an easement did not involve its duties as a public carrier. Also, unlike that case, the instant case did not involve a contract of adhesion.

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90. McCarthy v. NASCAR, 90 N.J. Super. 574, 218 A.2d 871 (1966), cert. granted, 47 N.J. 421, 221 A.2d 221 (1966), 39 Temp. L.Q. 214 (1966). The Superior Court opinion pointed out that the duty of inspection was for the protection of the spectators as well as the drivers.
92. Id. at 257, 408 P.2d at 912.
93. Id. at 259, 408 P.2d at 913, n.3.