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ENFORCING THE CONTRACT TO BARGAIN

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Recognizing the common law's reluctance to enforce an "agreement to agree," as distinguished from a binding contract, the author introduces the concept of a "contract to bargain" and seeks to justify its judicial recognition as a legally enforceable agreement. Arguing from the intention of the parties, the author finds that a period of preliminary negotiations often gives rise to a mutual commitment to bargain in good faith to complete the contract. Specific provisions as well as the broad policy of the Uniform Commercial Code are relied upon to justify this approach. A detailed analysis of a number of cases reveals the applicability of this construct and indicates the probable effect of its acceptance on the law. While it is recognized that it may be difficult to fashion an appropriate remedy for breach of a "contract to bargain," the case law demonstrates the dilemma confronting a court which does not recognize a middle ground between a completed contract and no contract at all.

I

INTRODUCTION

A. Purpose and Scope of the Study

The main theme of the discussion which follows will be that the common law has failed to deal adequately with many cases in which the parties to a negotiation have reached partial agreement on the terms of their eventual exchange. Such a thesis obviously requires some indulgence on the reader's part, and a certain amount of irreverence as well; to put the reader in the proper frame of mind it may be well to begin with two selections from Professor Corbin's treatise, probably the single most authoritative work in the area of contract law today:

Frequently agreements are arrived at piecemeal, different terms and items being discussed and agreed upon separately. As long as the parties know that there is an essential term not yet agreed on, there is no contract; the preliminary agreements on specific items are mere preliminary negotiation building up the terms of the final offer that may or may not be made. . . . Further illustrations are to be found in the so-called contract to make a contract. . . . If the document or contract that the parties agree to make is to contain any material term that is not already agreed on, no con-

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tract has yet been made; and the so-called "contract to make a contract" is not a contract at all.¹
No one can go to the moon.²

The common law of contracts assumes in general that there is a clear theoretical distinction between what the law calls a "contract" and the relation between those who have merely entered negotiations looking to the formation of a contract. The important difference between the initial stage of preliminary negotiation and the state of contract itself is, of course, that in the latter each party has enforceable rights against the other. Even though these rights may be conditional, and may never become rights to immediate performance, they nevertheless exist in the contemplation of the law—and they exist as soon as the contract comes into being.³

Correlative to (but not necessarily dictated by) the proposition that creation of a contract relation results in the immediate existence of rights, is the converse: until the stage of contract is reached, no rights exist because none have been created. One common expression of this proposition is the rule that an offer may be withdrawn at any time until its acceptance, with no liability on the part of the withdrawing offeror.⁴ To be accurate, this statement needs, of course, to be qualified: first, by recognizing that an offer may be accepted in a number of different ways, so that a commencement of performance may in some circumstances amount to acceptance;⁵ second, by the reminder that an offer

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¹ 1 A. Corbin, Contracts § 29, at 82-85 (rev. ed. 1963).
² 6 A. Corbin, Contracts § 1325, at 337 (rev. ed. 1963). The quoted language is found in the course of an explanation of the term "objective impossibility," and—in one sense, at least—was true when written. Professor Corbin was of course all too aware of the obvious point being made here. See Bibliography of the Published Writings of Arthur Linton Corbin, 74 Yale L.J. 311 n.1 (1964).
³ The Uniform Commercial Code contains the following language: "An agreement sufficient to constitute a contract for sale may be found even though the moment of its making is undetermined." Uniform Commercial Code § 2-204(2) (1962) (hereinafter cited as UCC). This flexible-sounding provision was apparently not intended to contradict the basic assumption that there is a single point in time when the parties cross the line from non-contract to contract; an earlier version of this provision, somewhat more susceptible to different interpretation ("Conduct by both parties which recognizes the existence of a contract is sufficient to establish a contract for sale even though the moment of its making cannot be determined."), was revised after disapproval by the New York State Law Revision Commission. N.Y. Law Revision Comm'n, Report Relating to the Uniform Commercial Code (Legis. Doc. No. 65A) (1956).
⁴ Restatement (Second) of Contracts § 41 (Tent. Draft No. 1, 1964); see generally 1 A. Corbin, Contracts § 38 (rev. ed. 1963).
may have been "paid for" with some kind of consideration sufficient to raise it, at least for a specified period, to the status of an irrevocable offer (meaning that the offeree has the power unilaterally to create the offered contract despite an intervening communication by the offeror of his unwillingness to complete the contemplated exchange of performances); and third, by noting that in some types of cases the courts have been willing to say that a clear and definite offer made in circumstances in which reliance is known to the offeror to be likely may not be withdrawn—at least not without some duty of compensation—where such reliance has occurred and is substantial. Underlying many of these legal rules is the general rule that existence of a binding relation of reciprocal rights and duties between the parties to a prospective exchange transaction depends on the existence of a contract. Thus, for a common law lawyer, characterizing a particular negotiation situation is likely to be a choice between two alternatives—contract or no-contract.

To some extent, the rigidity of the conceptual distinction thus maintained is weakened by garden-variety "legal realism," which readily admits that a court's decision on the question of whether a contract has been created will in some immeasurable but important respect depend on the "moral" or "ethical" quality of the conduct of the parties with respect to the particular transaction in dispute. Nevertheless, when the dispute is resolved, the court's decision will probably be based on one of two fundamental conclusions: that no contractual rights had been created (and thus none could have been violated); or that the agreement between the parties had reached the stage of a complete and binding contract.

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6 Restatement (Second) of Contracts § 35A (Tent. Draft No. 1, 1964); Restatement (Second) of Contracts § 89B(1) and Comment b (Tent. Draft No. 2, 1965).

7 Restatement (Second) of Contracts § 89B(2), Comment e, (Tent. Draft No. 2, 1965). See text accompany notes 45-50 infra.

8 The offer made irrevocable by justifiable reliance can be viewed as just another species of "contract," formed by a valid acceptance of a still open offer. However, it may be more accurate to view this situation, as well as the related case of unbargained reliance on a gratuitous promise, as an exception to the general rule referred to in the text, especially since partial enforcement is now clearly sanctioned as possibly sufficient in both cases. Compare Id. § 89B(2), Comment e and § 90, Comment e with Restatement (Second) of Contracts § 45 (Tent. Draft No. 1, 1964).

9 That judges are not immune from weighing the parties as well as their dispute, see 1 A. Corbin, Contracts § 1, at 3 (rev. ed. 1963). His assumption that "in our country, it is the comparatively poor who determine what the law is" may be somewhat harder to maintain today, however. For a grimmer view, see Schrag, Bleak House 1968: A Report on Consumer Test Litigation, 44 N.Y.U.L. Rev. 115 (1969).
The distinction between contract and non-contract could be phrased in another way, based on the presence or absence of legally enforceable duties. The person who becomes a party to a contract assumes a duty to go forward with the contemplated transaction. This duty may be inchoate, may be dependent on some measure of initial performance from the other party, and may even be destroyed by changing circumstances or by the other party's breach of duty. Nevertheless, initially it exists, and the contractor's freedom of action is curtailed thereby—so much so that his mere statement of intention not to be bound by the contract (i.e., not "to go forward") may amount to an immediate and total breach of contract, giving the other party a right to damages calculated with reference to the full expectation value of the contemplated exchange of performances. One who is not yet bound by a contract, however, has no such duty to go forward. He is at liberty to withdraw completely from the proposed transaction at any time, for any reason. He may choose to enter into a substitute transaction of a similar nature with some third party, or, indeed, to refrain from action altogether—in either case without being answerable to the abandoned party for any disappointment to the latter's expectations, however severe this may have been.

Such at least would be the view of the common law. It seems likely, however, that there are in fact many situations in which at some stage of negotiations the views of the negotiating parties as to their own "duty to go forward" would be somewhere between the two extremes described. Most of these cases would be among those customarily put in two of the traditional pigeonholes of contract law—the "agreement to agree" cases and the "formal contract contemplated" cases. The first of these categories is comprised primarily of transactions which have reached the stage of full agreement on many, perhaps most, terms of the proposed exchange of performances, plus agreement that an agreement should and probably will later be reached on the remaining terms. The second category includes those cases in which agreement has

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10 Restatement of Contracts §§ 318, 338 (1932).
11 Of course, if the disappointment is occasioned by the offeree's substantial, foreseeable reliance, he may have some remedy. See text accompanying note 7 supra.
been reached on many terms of the proposed exchange (probably at least enough to suggest that the parties considered the extent of remaining potential disagreement to be negligible), but it is nevertheless evident that the parties to the negotiation expected to sign later a detailed, formal, written document containing all the terms earlier agreed upon.

In each of these situations, the common law court considers the basic question to be whether at the time the dispute arose a contract had been made. In the “agreement to agree” case, the parties often have failed to achieve “contract” status simply because they did not reach a bargain complete and final enough to be worthy of (and capable of) legal recognition and enforcement. The intention of the parties not to have a binding contract is perhaps clear, but not of crucial importance. In the “formal contract contemplated” situation, however, the parties may have arrived at an agreement complete enough to satisfy even a demanding court, but the court is wary of enforcing the agreement because it doubts that the parties really intended their promises to be initially enforceable. Here the intention of the parties as to enforceability is said to be of paramount importance.

The draftsmen of the Uniform Commercial Code have undertaken to amend basic rules of contract law in a number of areas where courts have unjustifiably imposed on innocent businessmen the judges’ own ideas of what does or does not constitute a sufficiently complete contract. In line with this approach they have modified the “agreement to agree” rule to a considerable degree, so that now under the Code a contract may be found despite a substantial degree of “indefiniteness.” The “written contract contemplated” rule, on the other hand, survives today in much the same form as when it was first enunciated. This may be due

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14 The author of this article cannot pretend to have read all the reported decisions of such cases, or even all those cited in the treatises referred to in notes 12 and 13 supra. In the discussion which follows, recent cases illustrative of principles stated in the text will be cited as examples; additional case citations can be found in those authorities:

15 See note 27 infra for recent examples.
16 See Restatement of Contracts § 32 (1932).
17 See note 34 infra for recent examples.
18 See Restatement of Contracts § 26 (1932).
19 E.g., Poel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915); see UCC § 2-207.
20 UCC § 2-204(3). The revised Restatement does give considerably more weight to intention, following the lead of the Code. Restatement (Second) of Contracts § 32 (Tent. Draft No. 1, 1964); see Braucher, Offer and Acceptance in the Second Restatement, 74 Yale L.J. 302, 307-08 (1964).
21 Restatement (Second) of Contracts § 26 (Tent. Draft No. 1, 1964) substantially duplicates the original; however, Comment c (note) adds a number of
to the fact that it appears by its very nature to give effect to the real intention of the parties, rather than ignoring it.

It is suggested that in a number of cases, the "agreement to agree" rule—even as liberalized by the U.C.C.—and the "written contract contemplated" rule both run counter to the intentions and expectations of the parties at the time of the transaction under scrutiny. This is because the common law's dichotomy of contract/no-contract does not exhaust the catalog of possible intentions.

There is of course no absolute necessity for making the rules of law coextensive with the parties' ideas of what these rules should be. There are many kinds of conduct most people would label as somehow "wrong," which are neither criminal nor tortious. While "promises should be kept" is a moral stricture of rather general acceptance, the law of contract in general singles out only the "bargained-for" promise as worthy of organized protection.

This insistence on a "bargain," however, does suggest a reason for conforming the law to the private moral code of the parties in the cases under discussion. The Uniform Commercial Code, which, if only by the near-universality of its adoption, must be taken as the most authoritative statement of current American commercial law, purports to be a businessman's code, doing away with "outmoded" rules of law to the extent that they diverge from what businessmen regard as appropriate norms of conduct. In general, it makes a greater effort than the common law to provide means for discovering and following business custom. Indeed, although it does contain some attempts to define and differentiate the consumer transaction, the Code is generally indifferent to guidelines for determining the parties' probable intention. These principles, derived from Mississippi & Dominion S.S. Co. v. Swift, 86 Me. 248, 259 A. 1063, 1067 (1894), were included in response to Professor Llewellyn's criticism of the Restatement rule as originally formulated. See Llewellyn, Our Case-Law of Contract: Offer and Acceptance, I, 48 Yale L.J. 1, 14 n.29 (1938).

23 See Restatement (Second) of Contracts § 75, Comments a, b and c (Tent. Draft No. 2, 1965).
24 UCC §§ 1-205, 2-208; see Leve, Trade Usage and Custom under the Common Law and the Uniform Commercial Code, 40 N.Y.U.L. Rev. 1101 (1965).
25 The Code nowhere defines "consumer." It does distinguish in article 9 between "consumer goods" and other goods used as collateral, and provides some slight additional protection of various kinds to persons purchasing or borrowing against such items. UCC §§ 9-109(1), 9-204(4)(b), 9-206(1), 9-307(2), 9-505(1), 9-507(1). There is also some slight protection in article 2 against disclaimer of warranties on goods sold to consumers. UCC §§ 2-318, 2-719(3). Section 2-302, the "unconscionability" clause, has of course been most often employed in situations where one party was a consumer and the other a merchant. See Leff, Unconscionability and the Code—The Emperor's New Clause, 115 U. Pa. L. Rev. 485, 547-48 (1967).
the consumer; the "normal" transaction for Code purposes is an arms-length bargain between competent and experienced businessmen.

The Code thus seeks to follow the businessman into the marketplace, and shape decisions to the facts and norms of business life. If a class of transactions exists in which the law as presently conceived and administered fails to accomplish this goal, then certainly the Code, and perhaps the common law as well, should attempt to adjust existing rules to accommodate to the facts of business life.

The hypothesis here will be that such a class of transactions does exist: that in at least a substantial number of the "agreement to agree" and "formal contract contemplated" cases, the parties—at the relevant stage of negotiations—do consider themselves "morally" or "ethically" bound, but only in a limited way.

In the typical "agreement to agree" case, the parties have clearly intended to make some sort of "bargain"—they contemplate an exchange of performances, not simply a one-sided, gratuitous transfer. However, for some reason, they have postponed a present decision on one or more details of that exchange, such as the time for performance, the precise price to be paid, the terms of payment, or the amounts or varieties of particular goods to be furnished within an overall agreed amount—the possible range of such items is as broad as the whole scope of contracting activity.

At this stage of negotiation, there are a number of possible states of mind which the negotiating parties may have on the question of whether each is "bound" to the other (using "bound" here in the sense of bound by what each would regard as good business ethics):

(1) Each may regard himself and his opposite number as perfectly free for any reason whatsoever to refuse to reach agreement on the outstanding points, and to withdraw from the transaction without being bound to proceed farther with the exchange (except to pay some reasonable amount for any performance which may have already been rendered and received). This is also apt to be the answer of traditional contract common law to the question of whether any legally enforceable bond has been created: that no contract has yet come into existence, and thus

27 E.g., National Tea Co. v. Weiss, 341 F.2d 331 (7th Cir. 1965); Merritt-Chapman & Scott Corp. v. Gunderson Bros. Eng'r Corp., 305 F.2d 659 (9th Cir. 1962); Lizza & Sons, Inc. v. D'Oraio, 282 F.2d 175 (1st Cir. 1960); Pacific Hills Corp. v. Duggan, 199 Cal. App. 2d 806, 19 Cal. Rptr. 291 (Dist. Ct. App. 1962);
no rights exist other than those arising from a duty to make restitution for benefits actually received. No expectation damages can be recovered, because no reasonable expectations have yet been created; no reliance damages can be recovered, because no reliance on such an incomplete transaction is deserving of protection.

(2) Each may regard himself and his opposite number as being fully bound to the proposed exchange unless an excuse exists which would have been sufficient to excuse performance of an ordinary executory contract. Under this view even an eventual failure to reach agreement on the "postponed" points would not of itself be sufficient justification for withdrawal; an impartial arbiter could properly decree the standard of performance in the remaining areas of non-agreement. On the question of whether any legally enforceable bond has been created, this second view might also be the answer given by traditional contract law, based on the assumption that the agreement of the parties is complete, though imperfectly expressed. On any matters left open the parties should, if necessary, be bound in accordance with a stan-

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29 There is some authority for the proposition that a joint venture agreement may be too indefinite to constitute an enforceable contract and yet give rise to some kind of action for breach of fiduciary duty, based on wrongful appropriation of business opportunity; plaintiff's remedy may be computed with reference to the profit he would have made on the proposed joint venture. Air Technology Corp. v. General Elec. Co., 347 Mass. 613, 199 N.E.2d 538 (1964); accord, Mitchell v. Hart, 41 F.R.D. 138 (S.D.N.Y. 1966). Contra, Pacific Hills Corp. v. Duggan, 199 Cal. App. 2d 806, 19 Cal. Rptr. 291 (Dist. Ct. App. 1962).

30 Wright v. United States Rubber Co., 280 F. Supp. 616 (D. Ore. 1967). In Stewart v. Schmauss, 191 So. 2d 882 (La. Ct. App. 1965), plaintiff was apparently allowed to recover sums he expended in reliance on a lease agreement, despite the fact that the agreement itself was not binding; the court referred to La. Civ. Code Ann. art. 2315 (West Supp. 1969) as a basis for its decision.

dard to be set either by some designated impartial third party or by a court. This approach overcomes the objection that the agreement is too incomplete by finding it no more incomplete than many other perfectly unremarkable commercial contracts in which one or more terms of performance have to be supplied by the court in deciding questions of enforcement.

(3) Finally, it is possible that each of the negotiating parties really regards himself and the other party not as completely bound, but nonetheless as “committed to the deal,” and bound to the extent actual agreement is eventually reached. The parties are bound to try in good faith to reach some agreement and not to withdraw from the proposed exchange for any reason other than the eventual failure to reach such agreement. Implicit in this view of the facts are a number of assumptions: (1) that each party to the negotiations considers the proposed exchange beneficial and has indicated to the other that he can properly be regarded as “committed” to it; (2) that there is a mutual recognition by the parties that important points of substance remain to be decided at some later time, possibly in the light of changing or emergent conditions, but that an immediate decision on such matters would be premature and possibly damaging to one party or the other if conditions should develop in an unanticipated way; (3) and finally, that both parties regard the points remaining to be decided as being potential “deal-upsetters”—so material that failure to reach agreement must excuse further performance.

This third view of the transaction is one which has no common law counterpart. If the parties are legally bound to each other, then they have impliedly agreed to submit to the court’s judgment any terms which for some reason they omitted, left unclear, or reserved for future agreement. If the parties have not so bound themselves, however, they are not bound at all—no contract exists, only an “agreement to agree,” and each party is

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32 Muth v. J.W. Speaker, Corp., 151 F. Supp. 188 (E.D. Wis. 1957), aff’d, 262 F.2d 797 (7th Cir. 1959) (cancellation clause missing in patent licensing agreement; court holds the agreement terminates with the life of the patent); John W. Rouse Constr. Corp. v. Albany Acoustical Corp., 9 App. Div. 2d 38, 189 N.Y.S.2d 532 (3d Dep’t 1959) (time for performance not stated in construction sub-contract; not too indefinite for enforcement); cf. Citizens Util. Co. v. Wheeler, 156 Cal. App. 2d 423, 319 P.2d 763 (Dist. Ct. App. 1957) (court could supply missing terms in stocks sale contract); Borg-Warner Corp. v. Anchor Coupling Co., 16 Ill. 2d 234, 156 N.E.2d 513 (1958) (court could supply missing terms in employment contract in order to enforce specifically that agreement and related sale of assets; this case is discussed in the text accompanying note 147 infra).

33 See 1 A. Corbin, Contracts § 95, nn.9 & 10 (rev. ed 1963). As will be discussed below, this also appears to be the approach of UCC § 2-305, regarding agreements in which “the price is not settled.”
free at any time, and for any reason, to say "I choose to go no farther with this deal."

In the typical "formal contract contemplated" case, the parties have clearly intended a bargain; they have also reached the stage of agreement on at least a number of the material terms of the proposed exchange. However, for some reason, they both apparently contemplate the later execution of a full, formal written document. At this stage of the negotiations, there are once again a number of possible views which the parties may entertain as to the extent to which each of them is "bound," by good business ethics, to the proposed exchange of performances:

(1) Each may regard himself as not bound to anything at all unless and until a formal writing is signed by him, and, further, as being free to refuse to sign that writing for any reason whatsoever. This is one possible view which the law may take as to the extent of the obligation created by the negotiations to date—none at all.44 A legal conclusion of this sort, which will be presented as the reflection of the parties' intention, is made more likely by the presence of factors such as the following: a) the contract is of a type which requires writing for enforceability under the Statute of Frauds; b) the contract contemplated involves large sums of money; c) the contract has many details; d) the contract is an unusual one, for which a standard form is not available or appropriate; e) the parties were apparently unwilling to proceed with any performance until the formal document was prepared and signed.45 There are many cases in which it is impossible to believe that the parties intended any liability to attach

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45 Such factors are referred to in Restatement (Second) of Contracts § 26, Comment c (Tent. Draft No. 1, 1964); cf. note 21, supra. Brause v. Goldman, 10 App. Div. 2d 328, 199 N.Y.S.2d 606 (1st Dep't 1960), also involved the Statute of Frauds; all the other factors mentioned appear to be present in Michigan Broadcasting Co. v. Shawd, 352 Mich. 453, 90 N.W.2d 451 (1958).
to either side until final execution of the contemplated formal document.\textsuperscript{30} 

(2) Each party may really feel that the "formal" document is only a "formality"—some sort of ritual, desirable for one or more reasons, but in no sense a prerequisite to a "binding" agreement.

This second view is, again, not an unlikely one for the law to adopt on the issue of whether in a particular case a binding legal obligation has been created.\textsuperscript{37} The likelihood of such an outcome is increased where: a) no independent policy of the law requires a writing for enforceability, or, if it does, the parties have exchanged letters, telegrams or other writings in which the agreed-upon terms are sufficiently reflected; b) the proposed contract appears relatively simple, and does not involve long-term obligations; c) the contemplated "formal" contract is a standard-form document, which itself contains the details necessary for a contract of this sort; or d) the parties themselves, without waiting for the formality of execution, have proceeded to perform, in a way that suggests they believed full and binding agreement to have been reached.\textsuperscript{38}

In each of the two preceding characterizations of the "formal contract contemplated" situation, the parties may have actually reached agreement on every detail of their proposed exchange. In such a case where at the relevant point in negotiation there

\textsuperscript{30} Occasionally a carefully drafted agreement will clarify the parties' intention in this respect; e.g., Smissaert v. Chiodo, 163 Cal. App. 2d 827, 330 P.2d 98 (Dist. Ct. App. 1958); Brause v. Goldman, 10 App. Div. 2d 328, 199 N.Y.S.2d 606 (1st Dep't 1960); but see Brassteil Mfg. Co. v. MitsubishiIntl Corp., 21 Misc. 2d 343, 102 N.Y.S.2d 200 (Sup. Ct. 1959) (clause stating "this represents our understanding and working agreement until legalized by appropriate contract" held merely to create an ambiguity, to be resolved against the defendant drafter whose motion to dismiss should therefore be denied). In some cases the parties may simply have little or no intention at all on the question; see, e.g., Lemoine v. Goudeau, 127 So. 2d 207 (La. Ct. App. 1961).


remain terms on which agreement has not been expressly reached, there is yet a third possibility.

(3) It is possible that the principals have carried the “deal” as far as they can, and that they are relying on their agents (almost always including lawyers, but possibly also accountants and other experts) to complete the process of agreement. In this view of the facts, the purpose of preparing the formal document is not simply to postpone creation of an obligation, or even to provide evidence of its existence or terms, but rather to afford these experts an opportunity to add to the total agreement such protection against various risks as they think necessary or prudent. On this assumption, the principals are likely to feel ethically bound to the outlines of the deal as they have hammered it out, the withdrawal of either one based simply on dissatisfaction with those outlines being regarded by both as admittedly unjustified. The principals, however, are likely to consider themselves still morally free to withdraw if and when it should appear that the “second team” of bargainers have raised a substantial issue on which they are unable to agree and which the principals, when apprised of the difficulty, are likewise unable to resolve.

As with the “agreement to agree” discussed above, this third, middle view of the intention of the parties has no common law counterpart. It is similar to the first view in that the execution of a formal writing, or, at least, full agreement on each of its terms, is the point at which the completely binding contract is created. In the eyes of the parties, however, a significant narrowing of the “moral right” to withdraw has occurred at a much earlier time (although immediate commencement of performance is still to be viewed as risky, in light of the continuing possibility of eventual disagreement followed by justified withdrawal).

B. The Contract to Bargain

The preceding discussion has preserved the distinction between the “agreement to agree” situation and the “formal-contract-contemplated” situation, resting the distinction on the nature of the reason for delaying agreement: where the delay is to await the occurrence of further events which control the future agreement, the relationship is termed an “agreement to agree”; where the delay is to permit negotiations which will settle the details of a transaction already fully agreed upon in its “essential” terms, the case has been referred to as one where a “formal contract” is “contemplated.” Of course, the boundary between the two cate-
gories is not always clearly ascertainable, and a given case may well be characterized as falling in either—or indeed, in both.\textsuperscript{39}

For our purposes, therefore, it will be sufficient to further describe and define the two “middle” positions outlined above, in order to stress the essential similarity between them and the difference between these two categories and other, more conventional analyses. Thus, it has been suggested that in each of the two hypothetical cases above, the parties have reached agreement to such a degree that they regard themselves as bound to each other to the extent that neither can withdraw for an “unjustified” reason, and yet still free enough that neither will be compelled to perform if—after good faith bargaining—actual agreement cannot be reached. This situation, if recognized at law in the manner suggested, might be most accurately denominated a “contract to bargain.” This nomenclature seems accurate for the following reasons: (1) Use of the word “contract” stresses the fact that the relationship, to at least some extent, entails binding obligations, the breach of which will give rise to a legal remedy.\textsuperscript{40} (2) Use of the term “bargain” emphasizes that such a contract imposes neither an absolute duty to perform the contemplated exchange, nor even an absolute duty to agree to perform it. Rather it creates a present duty to “bargain”—to engage, in good faith, in the process of attempting to reach agreement on the terms of the proposed exchange, for as long as may reasonably be required under the circumstances.\textsuperscript{41}

As used herein, therefore, the term “contract to bargain” will be used to describe any situation where two or more parties have commenced negotiations looking toward a particular exchange, have reached actual agreement on some important terms of the proposed exchange, have delayed agreement on other terms of real importance, but have nevertheless mutually signified their willingness to be regarded as “committed” to the entire proposed exchange. Each regards withdrawal by the other—for a reason


\textsuperscript{40} The UCC distinguishes between the terms “agreement” and “contract,” using the former to refer to the bargain of the parties and the latter to mean the legal obligation created thereby. UCC § 1-201(3), (11).

\textsuperscript{41} Use of the verb form “to bargain” (rather than “contract of bargain” or just “bargain contract”) is intentional, in the hope of stressing the process of bargaining which remains to be performed, rather than the agreement (if any) which will result therefrom.
other than failure to reach agreement on the remaining points—as unjustified, and worthy of both moral and legal condemnation.

II. LEGAL AUTHORITY FOR THE CONTRACT TO BARGAIN

A. CASE LAW

The preceding discussion has served to demonstrate that the common law has been not so much resistant as oblivious to the notion that there might be an enforceable contract to bargain. Is there any reason to think that the courts might prove receptive to the analysis outlined above? The answer suggested here is that some authority exists for the duty to bargain as a legally enforceable obligation, that, more importantly, the Uniform Commercial Code furnishes ample room for any judge so disposed to grant enforceable status to the contract to bargain, and that important policies would indeed be furthered by such a decision.

The judicial authority referred to is found in **Hoffman v. Red Owl Stores, Inc.**, a Wisconsin case decided in 1965.\(^{42}\) Plaintiff Hoffman, the owner of a small bakery shop, was interested in becoming the operator of a supermarket. He entered into negotiations with defendant Red Owl, a company with a chain of supermarkets around the state. Receiving assurances that the amount of capital he proposed would be sufficient to enable him to establish and operate a Red Owl store, Hoffman undertook—at defendant’s urging—a series of actions aimed at the eventual establishment of a supermarket business. He sold his bakery, bought a small grocery store (to gain experience in this field), sold the grocery store, and purchased an option on a lot in the town where he contemplated opening his store. Hoffman’s sad tale ended when Red Owl insisted on his furnishing more capital than he had available, on terms different from those originally proposed. He then brought an action seeking damages for the refusal of defendant to honor its commitments made during the process of negotiation. The trial court awarded judgment for the plaintiff, and the Wisconsin Supreme Court (although disapproving the trial court’s computation of damages) approved the decision on the basis of a principle which had received little or no application in Wisconsin—Section 90 of the Restatement of Contracts, the so-called “promissory estoppel” section.\(^{43}\) This section generally states that a promise should be enforced where it should reasonably have been foreseen by the promisor that substantial reliance by the

\(^{42}\) 26 Wis. 2d 683, 133 N.W.2d 267 (1965).

\(^{43}\) Id. at 693–99, 133 N.W.2d at 272–75.
promisee would follow, if as a result of such reliance injustice can be prevented only by enforcing the promise in some manner.\textsuperscript{44}

If one were to find any authority for the principle that a contract to bargain may give rise to enforceable rights, the still-developing area of promissory estoppel would at first appear to be a likely source. Traditionally non-traditional, promissory estoppel has steadily expanded from its modest beginnings,\textsuperscript{45} and has provided remedies for many plaintiffs who could not have qualified for relief under more conventional contract analysis.\textsuperscript{46} Furthermore, an initial obstacle to the free employment of promissory estoppel has been removed by the apparent consensus of authority—after some initial opinion to the contrary\textsuperscript{47}—that protection of reliance is not confined to the case of the “gratuitous” promise.\textsuperscript{48} Promissory estoppel is now employed with increasing frequency in what are essentially commercial, “bargaining” situations; indeed, this principle has been used to justify the awarding of a remedy in a number of cases where a bargain was under negotiation but no final agreement had been reached.\textsuperscript{49}

These cases do not, however, furnish much authority for the recognition of a contract to bargain. They are generally referred to as the “firm offer” cases, and they turn on the question of

\textsuperscript{44} Restatement (Second) of Contracts § 90 (Tent. Draft No. 2, 1965) provides as follows:

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.

The protection of third-party reliance and the suggestion of partial enforcement are new in this version; see Restatement of Contracts § 90 (1932).


whether reliance on an offer before acceptance is sufficient to make the offer irrevocable or, at least, to give the offeree a right to compensation for his expenses incurred in reliance, where the offer is thereafter withdrawn before acceptance. The “firm offer” cases fail to support the thesis only because the courts have generally assumed, when deciding this type of case for the plaintiff, that the defendant had made an “offer”—a manifestation of contractual intent so definite that nothing remains for the formation of a binding contract but the offeree’s manifestation of acceptance.50

In contrast to those cases, our analysis of the contract to bargain has stressed the fact that the parties have not yet reached the stage where all terms are settled, and only a final assent is lacking. The courts have held that one cannot claim the protection of section 90 if he has relied on a promise which was illusory.51 The firm offer cases similarly suggest that one cannot justifiably rely on an offer unless it is an “offer” in the conventional sense—final and complete in all its terms.52 If so, then, section 90 falls short of conferring enforceable status on the contract to bargain.

There may of course be cases where the principle of requiring a definite offer as the basis for reliance was in fact strained beyond the breaking point. The importance of the Hoffman case, however, lies as much in the way the decision is explained as in the decision itself. With commendable candor, the court makes no attempt to obscure the fact that the parties had not reached final agreement on all material terms when the deal fell through. The defendant thus could not be said to have made an offer so definite that plaintiff, simply by accepting, could cause a contract to come into being. The court compensated plaintiff for his reliance on defendant’s assurance not that agreement had been reached, but only that it would be reached—and on terms satisfactory to the plaintiff.

It is thus reasonable to interpret Hoffman as furnishing authority for the proposition that one may in some circumstances come under a duty to bargain in good faith, breach of which duty may result in liability for damages, at least to the extent of compensating the detrimental reliance of the injured party.53 Certain


questions do arise, however, in the course of attempting to fit the Hofmann case into the pattern of a contract to bargain, as previously defined. First, it is not clear from the opinion whether the principle of recovery there announced may be restricted to cases in which there is some kind of bargaining imbalance which gives the plaintiff a claim to extra indulgence from the court, beyond that to which a businessman bargaining as an equal would be entitled. Although the decision is not based expressly upon such factors, it is difficult to escape an initial impression that Hofmann appeared to the court as a sort of babe in the Wisconsin woods, dealing with a bunch of city slickers from the Red Owl gang. The court may thus have protected Hofmann against risks which it would have expected an experienced businessman to bear himself. The concept of a contract to bargain does not, however, require either party to demonstrate his naivete, but merely regard withdrawal as dishonorable. It may of course be argued that for each party to expect the other to be honorable is naivete in its purest form. The U.C.C., however, clearly views business honor as the product not of innocence, but of experience—it is a standard of conduct created by the business world itself, over a period of time, out of countless business transactions.

A second problem in characterizing the Hofmann negotiations is the difficulty in evaluating the extent of actual agreement reached by the parties and the degree to which they manifested their commitment to the proposed exchange of performances. It is possible, for instance, that the court in Hofmann could have concluded that plaintiff really believed that the deal was finally agreed upon, or at least that the negotiations were so advanced as to amount to a contract fully binding in all respects. Even more likely, from the facts described by the court, is the possibility that the manifestations of "commitment," on which the decision largely depends, came principally from Red Owl rather than from Hofmann. If so, had the tables been turned and Hofmann been the one who backed out of the agreement, he would not have been liable to Red Owl.


65 In the case of a "merchant," "good faith" under Article 2 of the U.C.C. includes "the observance of reasonable commercial standards of fair dealing in the trade." UCC § 2-103(1) (b).

Whatever its consequences in terms of legal recognition of rights and granting of remedies, the contract to bargain is basically a bilateral arrangement; its claim for legal recognition is principally based upon the contention that there are cases where a level of agreement has been reached, and manifested, which is sufficient in the eyes of the parties themselves to bind them, absent good faith justification for withdrawal. A fundamental characteristic of promissory estoppel is its one-sidedness—only one party having enforceable rights against the other. In that respect, *Hoffman*, if it is truly a promissory estoppel situation, is closer to the "firm offer" cases than to the contract to bargain situation. In emphasizing *Hoffman* as authority for the contract to bargain, one runs the risk of subordinating and even obscuring the factor of mutual agreement clearly expressed. Reliance may provide a good additional reason for enforcement of the contract to bargain, and in many cases there may be no remedy for the breach of such a contract unless reliance can be proved. However, there appear to be no compelling reasons for limiting the application of the contract to bargain concept to cases where reliance has taken place, nor indeed is there any justification for applying it at all where—as may have been the case in *Hoffman*—the parties have not both committed themselves to the agreement actually reached, reserving the privilege of bargaining in good faith over the remaining terms.

**B. The Uniform Commercial Code**

Whatever its implications, the *Hoffman* case is precedent in only one jurisdiction, and has yet to give birth to any noteworthy offspring. The Uniform Commercial Code, on the other hand, is law in forty-nine states, and is important not only for the transactions which it expressly governs, but also for the myriad of other contractual relationships which it can influence by analogy. Indeed, evidence is already accumulating that the "general part" of the U.C.C. is the American contract law of the immediate future. This can be seen not only in judicial decisions but also

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57 It is of course possible to conceive of two parties each bound to the other by virtue of the latter's substantial reliance on the former's promise, but the circumstances would then make it likely that a contract would exist (if only based on a course of conduct) and would also make it unlikely that either party would withdraw. In the ordinary case, an estoppel-based obligation is more akin to an option contract. Cf. Restatement (Second) of Contracts §§ 45, 89B (Tent. Draft No. 1, 1964).


in the frank attempt of the Restatement to incorporate as much of the U.C.C. as can be decently accommodated in what purports to be a compilation of non-statutory law.\(^6\)

In order to examine the extent to which the contract to bargain might be comprehended within the general scheme of the U.C.C., consider first the possible objections which traditional contract law would have to its enforcement: no mutuality of obligation; lack of consideration; presence of illusory promises; absence of intention to be bound; “formal contract contemplated”; lack of certainty and definiteness; “agreement to agree.”

It is submitted, however, that a number of these objections can easily be disposed of if one really wants to find a basis for enforceability. The issue of “mutuality of obligation” (“both parties must be bound or neither is bound”) has been described by respectable authorities as merely the “consideration” requirement under an alias;\(^6\) to the extent that it reflects a distinct policy, it is presumably aimed at a certain kind of “transaction imbalance” characterized by one party being tied to a long-term relationship, the other party being bound only so long as he considers it beneficial.\(^6\) This problem is not present in the contract to bargain, where the parties—to the extent they are bound at all—are bound equally.

The “consideration” requirement also appears upon examination to be no real obstacle to enforceability. To the extent that consideration reflects a policy different from those expressed by the other objections enumerated, this appears to be centered on the need for a “bargain” as the basis of the transaction.\(^6\) That requirement is met in the contract to bargain, where there exists not a gift transaction or a gratuitous promise, but rather an exchange of evenly-balanced, bargained-for promises.

The next objection advanced is that the promises are “illusory,” and therefore not binding; this objection is also untenable.\(^6\)

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\(^6\) Restatement (Second) of Contracts § 81, Comment f (Tent. Draft No. 1, 1964); 1A A. Corbin, Contracts § 152, at 5-6 (rev. ed. 1963); Patterson, An Apology for Consideration, 58 Colum. L. Rev. 929, 939-41 (1958).

\(^6\) E.g., Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 F. 693 (5th Cir. 1924); Reliable Constr. Co. v. Lifetime Indus., Inc., 188 F. Supp. 242 (S.D. Ohio 1960). The “mutuality” approach, of course, only results in freeing both parties from the contract; a reverse approach is suggested in Gellhorn, Limitations on Contract Termination Rights—Franchise Cancellations, 1967 Duke L.J. 465.


\(^6\) The “illusory promise” issue can be viewed as one aspect of the consideration requirement, a case where “legal detriment” is lacking. See 1 A. Corbin, Contracts § 145 (rev. ed. 1963).
The parties may not have promised to go through with the eventual proposed exchange of performances "no matter what," but they have promised to negotiate with each other in good faith toward that end. A promise to negotiate in good faith is non-illusory in two respects: it commits the promisor to a course of action with no condition of subsequent "willingness" on his part; it also results in a substantial narrowing of the promisor's options—his freedom to withdraw from the transaction or enter into a substitute is now restricted. Finally, the contract to bargain may contain elements of both the "formal contract contemplated" and the "agreement to agree" cases. To the extent that such elements in the transaction are symptomatic of an intention not to be legally bound by the tentative agreement, the objection to enforcement would properly be raised. If the intention to be legally bound is clear, however, then objection to enforceability based on lack of such intention is obviously invalid. In this event the presence of the "agreement to agree" element would be a valid reason for denying enforceability to a contract to bargain only if it entailed such a lack of definiteness and certainty of terms as to prevent effective enforcement—the last suggested objection.

Each of the other objections raised above can be overcome without necessarily repudiating the rule on which that objection is based. This one probably cannot. Despite the efforts of some courts and commentators to show that a lack of definiteness does not always import lack of intention to be bound, and that in some cases the remedy for breach may be adjusted to reflect the indefiniteness of the agreement, the common law legal world is too imbued with the hoary precept that "an agreement to agree is not a contract" to change its ways.

The U.C.C., however, accepts the proposition that lack of definiteness does not per se preclude enforcement of rights under an agreement. Section 2-204(3) of the U.C.C. poses a two-fold test: (1) Did the parties "intend to make a contract?" Since the

65 Compare the purely illusory promise made in Hogan v. Wright, 356 F.2d 595 (6th Cir. 1966) which is discussed in Knapp, Contracts, 1966 Ann. Survey Am. L. 133, 137-38.

66 Cf. 1A A. Corbin, Contracts § 160 (rev. ed. 1963).

67 E.g., Restatement (Second) of Contracts § 32 (Tent. Draft No. 1, 1964); 5A A. Corbin, Contracts § 1174 (1951).

68 "[W]e are not persuaded that renewal options in leases are of such an exceptional character as to justify emasculation of one of the basic rules of contract law. An agreement to agree simply does not fix an enforceable obligation." Walker v. Keith, 382 S.W.2d 198, 201 (Ky. 1964).

69 "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."
U.C.C. generally distinguishes between the terms “agreement” and “contract,” suggesting that the latter has reference to a “legal obligation,” the parties must have intended to create a legally binding relationship;\(^{70}\) (2) Is there “a reasonably certain basis for giving an appropriate remedy?” As regards this second requirement, two points are immediately apparent. First, the Code is not insisting on absolute certainty, but only on “reasonable” certainty, with the result that the court will in many cases be forced to determine what would have been a “reasonable” term for the open points.\(^{71}\) Second, the Code is not insisting that the agreement be “reasonably” certain for all enforcement situations which might arise. The question posed is simply this: “Is there a reasonably certain basis for giving an appropriate remedy to this plaintiff, against this defendant, in the circumstances of this breach of the agreement?”\(^{72}\)

So interpreted, section 2-204 on its face poses no barrier to the enforcement of a contract to bargain—assuming that an appropriate remedy can be devised for the complained of breach. Indeed, in some respects the recognition and enforcement of a contract to bargain should be a less difficult pill for the common law lawyer to swallow than was the U.C.C.’s assertion of an even more sweeping power under section 2-204(3), which some have attacked as giving the court a warrant to “make a contract” for the parties by fixing terms the parties themselves had not agreed upon.\(^{73}\) In the case of a contract to bargain the court would not be required to “make” a contract for the parties, but only to enforce as a contract an agreement which the parties themselves had already made.

Section 2-204(3) does, however, free us from the hitherto seemingly universal rule that “an agreement to agree can never be a contract.” In applying the U.C.C. to a contract to bargain, then, the first question is one of fact: what sort of “contract,” if any, did the parties intend to make? To deny legally-enforceable status to such an agreement under section 2-204(3), on the ground that the parties did not intend to “make a contract,” is to assume that the word “contract” as used in section 2-204(3) means “contract which the common law would have enforced before the enactment of the Uniform Commercial Code,” and only that. This assumption is so obviously contrary to the whole thrust of section

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\(^{70}\) See note 40 supra.

\(^{71}\) UCC § 2-204(3), Comment.

\(^{72}\) This issue is discussed below; see text accompanying note 170 infra.

2-204, and other parts of the Code as well, that it requires no further discussion.\textsuperscript{74} The only remaining objection to enforceability is whether an appropriate remedy exists; this cannot be answered without first knowing the circumstances existing at the time of defendant's breach and the nature of that breach.

Having met these requirements, it appears that the contract to bargain can fit quite comfortably under the umbrella of 2-204 (3). Furthermore, it should be noted that legal recognition of the contract to bargain would further a number of policies generally favored by the Code:

1) The Code takes the position that the law should give effect to the intention of the parties, where it can be ascertained, if such intention does not violate some other express policy of the Code.\textsuperscript{75} This principle is reflected not only in section 2-204(3), where it is clearly evident, but also in the remainder of section 2-204, and in various other sections.\textsuperscript{76}

Indeed, one of the principal aims of the draftsmen was to adjust the law to reflect actual business practice, and give effect to the businessman's intention, rather than forcing him to conform to a court's ideas of the proper form for business agreements.\textsuperscript{77}

2) The parties to any commercial transaction covered by the Code should be held to the standard of honorable conduct generally referred to as "good faith," which, in the case of a "merchant" (i.e., a businessman in the conduct of his business), means not only "honesty" but also "the observance of reasonable commercial standards of fair dealing in the trade."\textsuperscript{78} If a contract to bargain were to be enforced according to its terms, with some remedy being made available to the aggrieved party in the event

\textsuperscript{74} Such a construction would mean, for instance, that a "one-sided" modification of an agreement, binding without consideration under UCC § 2-209(1), would not be a "contract" as that term is used in UCC § 2-204(3).

\textsuperscript{75} UCC § 1-102(2)(b), (3), (4).

\textsuperscript{76} See UCC §§ 2-205 ("Firm Offers"), 2-206 ("Offer and Acceptance in Formation of Contract"), 2-207 ("Additional Terms in Acceptance or Confirmation," the so-called "battle of the forms" provision), 2-208 ("Course of Performance or Practical Construction"), and 2-305 ("Open Price Term").


\textsuperscript{78} UCC § 2-103(1)(b). The term "good faith" as used in the UCC refers to two different concepts. One is the idea of "good faith purchase," the other a standard of "honest" (and in the case of a "merchant," "commercially reasonable") conduct in commercial transactions. See Farnsworth, Good Faith Performance and Commercial Reasonableness under the Uniform Commercial Code, 30 U. Chi. L. Rev. 666, 667-71 (1963) (the latter is "an implied term of the contract requiring cooperation on the part of one party to the contract so that another party will not be deprived of his reasonable expectations." Id. at 669). As used throughout this discussion, "good faith" has only the latter meaning.
of breach, then obviously the general purpose of holding merchants to good faith standards of conduct would be served; just as obviously, if such a contract were not be enforced at all, the Code's purpose of promoting and protecting good faith would be subverted. In his recent comprehensive study of "good faith" under the U.C.C., Professor Summers suggests that the Code imposes no duty of good faith with respect to conduct occurring prior to the formation of a contract. But it is here assumed that a contract has indeed been made, and the only question is whether the court will enforce it according to its terms. This being the case, there appears to be no reason why the Code's general obligation of good faith should not apply to this type of contract as it does to any other.

3) Although other points could be raised to demonstrate that the contract to bargain promotes Code policy, there is one in particular that merits consideration because it is of a slightly different nature: it can be contended that decisions like those here argued for are desirable—even necessary—if the Code is to survive as a viable body of law. When the Code was first proposed, one of the chief arguments against its adoption was that the flexibility and potential for change inherent in a common law system would be sacrificed for a rigid system of rules which—however "advanced" or "modern" in their inception—would inevitably become outmoded, stifling further growth. The drafters of the Code tried to overcome this fear in a number of ways, one of which was to build into the Code a number of "expandable" concepts, such as "commercial reasonableness," "good faith," and "unconscionability." Although the courts are not free to contravene the express language of the Code, they must be free within the confines of that language to reach particular decisions not expressly contemplated—perhaps even feared—by the very men who drafted the Code and voted its adoption.

82 See the comment in Professor Patterson's commentary for the New York Law Revision Commission's study, discussing practitioners' uneasiness with the "broad provisions," and "principles and policies" of the Code:

[T]he way to limit such vague norms is not to reject them as wrong but to exclude them as for the present problem irrelevant. Thus if some distressed buyer of goods, under the proposed code, argues that the contract
Before leaving this discussion of the Uniform Commercial Code, it is only fair to note at least one argument against recognizing the contract to bargain under section 2-204(3). The general policy set forth by that section is given more particular expression in section 2-305, which deals with one important type of failure to agree—lack of agreement on price. Undoubtedly influenced by the knowledge that price would probably be regarded as the most material term of any contract for the sale of goods, section 2-305 deals with omission of a price term. It repeats the general purpose of section 2-204(3), stating that the parties can, if they so intend, make a contract even though the price is not settled; it notes some of the ways in which an agreement lacking a fixed price may nevertheless provide sufficient basis for the determination of price (e.g., reference to some agreed market or other standard set by some third person or agency); it declares that where a price is left to be fixed by one of the parties, it is to be fixed in good faith, it declares the court's determination of a "reasonable" price to be binding in those cases where a contract was intended but the price has not been fixed.

To this point, section 2-305 appears merely to reinforce the general policy of 2-204(3), and does not contain any express denial of enforceability for the contract to bargain. Questions are raised in that regard, however, because of the concern of 2-305 with the fixing of a "reasonable" price. If "reasonableness" governs in every case where the parties intend to create a contract for sale without an agreement on price, then a contract to bargain over price is not comprehended within 2-305(1). The language of the second sentence of subsection (1) may negate this, however, by implying that the price will be a "reasonable" one in some but not necessarily all cases.

A far more serious obstacle to Code-based recognition of the
contract to bargain is contained in subsection (4) of 2-305, which provides as follows:

(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 to do so must pay their reasonable value at the time of delivery and the seller must return any portion of the price paid on account.

One possible construction of the first sentence of this provision obviously rejects—at least in the case of a failure to reach agreement on price—the concept of a contract to bargain. The argument appears to be a strong one, and is supported by the brief reference to subsection (4) in the comment on 2-305. Nevertheless, there are at least two ways in which the first sentence can be read to permit recognition of the contract to bargain. One is to say that the parties do indeed “intend ... to be bound,” at least to a limited degree. That being so, the sentence does not apply. The trouble with this argument is that it is only partially accurate; the parties may nevertheless “intend not to be bound” should they be unable to agree eventually on price or any other material open term. The better argument is that, as applied to the contract to bargain, the first sentence of 2-305(4) should be read as follows: “Where ... the parties intend not to be finally bound unless the price be ... agreed and it is not ... agreed because the parties bargaining in good faith have failed to reach agreement, then at that point there is no contract.”

Although this construction may be more strained than the first, it is submitted that neither construction is unreasonable, because the language of 2-305(4) was simply not drafted with the contract to bargain in mind. Subsection (4) merely provides express recognition for the obvious fact that some “agreements to agree” do not qualify for enforcement under 2-305(1), and provides a remedy in restitution where such an agreement has nevertheless been partially performed. Section 2-305 may also be read to prohibit the contract to bargain, but if so, it is only by accident, not by design. If recognition of such a contract seems otherwise reasonable, just, and an accurate reflection of the par-

85 “Under some circumstances the postponement of agreement on price will mean that no deal has really been concluded, and this is made express in the preamble of subsection (1) ... and in subsection (4).” UCC § 2-305, Comment 2.

86 The author admits that his initial response to the question of construction was that subsection (4) probably prevented the existence of any contract at all until (if ever) price was actually agreed upon. Carroll, Clarkson & Knapp, Contracts, 1967 Ann. Survey Am. L. 405, 419 n.82.
ties' probable intention, then section 2-305 is not an insuperable obstacle.

III

ILLUSTRATIVE CASES

A number of questions remain unanswered. What sort of manifestation of intention will create a contract to bargain? What types of conduct would constitute a breach of such a contract—in other words, what do the very broad terms "good faith" and "bad faith" mean in this context? What sort of remedy would be available for such a breach, even if the law should in theory regard the agreement as a "contract," creating legally-recognized rights? And, finally is the above discussion merely an academic exercise—is there ever going to be an actual contract to bargain?

By examining the facts of a number of relatively recent cases in the "formal contract contemplated" or "agreement to agree" category, one can gain some idea of whether the agreement in question could have been characterized as a contract to bargain; the facts in these cases may also suggest answers to the other questions posed. In addition, a review of such decisions indicates what effect, if any, the adoption of the "contract to bargain" approach would have on either the future state of the law, or the results of the cases themselves.

A. Contracts to Lease

Three similar cases involving leases provide a starting point. At least one of the cases, Joseph v. Doraty, probably involved a contract to bargain, and the second, Robert v. Adams, could be so regarded. The third case, Walker v. Keith, is quite close to Roberts on its facts, but probably should not be characterized as involving a contract to bargain; discussion of that case will serve, however, to further illustrate the relation of U.C.C. Section 2-305 to the contract to bargain concept.

In Joseph v. Doraty, a 1957 Ohio case, plaintiffs sought to lease property from the defendant for the apparent purpose of operating a motor rebuilding business. The parties signed a written agreement providing for a five-year lease at a yearly rental of $12,000, with provision for an option to renew for an additional five-year period at the same rent. The agreement contained the following paragraph:

87 77 Ohio L. Abs. 381, 144 N.E.2d 111 (Ohio Ct. App. 1957).
Second parties [lessees] hereby deposit with first party [lessor] the sum of $1,000, to show their good faith in consummating the lease to be drawn and subject to the approval of first party's and second parties [sic] attorney. Said deposit will apply on the first month's rental. ...  

A lease was prepared by the defendant's attorney, and forwarded to plaintiffs' lawyer, who made a few changes and returned it; nothing more was done with the lease. The defendant later (how much later, we are not told) returned plaintiffs' deposit and leased the premises to another. An action for specific performance followed.

The Ohio Court of Appeals, affirming the trial court's ruling, held that no legally enforceable contract had been made—only "an agreement to enter into an agreement." The court rested its conclusion on two points: the language in the agreement (quoted above) provided that the lease to be executed first had to be approved by counsel for both parties; and the writing made no provision for a number of other matters—"taxes, insurance, utilities (including water), rights of the parties in case of default, destruction by fire, or extent of repairs required by both parties for the portion of the building they agreed to repair."

The court disposes of this case in typical common law fashion; it properly cites Section 26 of the Restatement of Contracts, in light of the requirement in the agreement that counsel approve the lease. Nevertheless, the opinion is on its face guilty of setting up objections to the agreement which the parties themselves had not raised, and which apparently did not in any manner contribute to the lessor's decision to break the agreement. Does this mean the court was wrong in ruling as it did?

The court is right in pointing out that each party did not intend to be fully bound to the agreement as it stood, if his attorney disapproved of it. It appears, however, that the parties had expressed satisfaction with the basic terms of the lease as they had worked them out, and were waiting for their attorneys only to insert the kind of details that attorneys are paid to provide (and which the judge himself volunteered in his opinion). If

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88 Id. at 382, 144 N.E.2d at 112.
89 Id. at 384, 144 N.E.2d at 114.
90 Id. at 384, 144 N.E.2d at 113-14.
91 Restatement of Contracts § 26, Comment a (1932), states in part: "[I]f the preliminary agreement is incomplete, it being apparent that the determination of certain details is deferred until the writing is made out . . . the preliminary negotiations and agreements do not constitute a contract."
92 See text accompanying note 90 supra.
the parties had been asked at the time they signed their agreement whether each regarded himself as free to withdraw for any reason—including simply a better deal somewhere else—they both would have probably disclaimed any such privilege of withdrawal. At least each would probably have disclaimed it in the presence of the other party, which may be a good rule of thumb for questions of this sort. If this assumption is correct, then the court could have properly concluded that the privilege of withdrawal was available only where the attorneys were unable to reach agreement in good faith, and was not intended to extend to a withdrawal for unrelated reasons. Unless facts material to this question are omitted from the opinion, the court should then have enforced this agreement as intended by the parties, the defendant being guilty of a breach of contract.

A lease agreement was also at issue in *Roberts v. Adams*, but the dispute arose out of a purchase option contained in the document. The plaintiff’s five-year lease originally granted him “the option to purchase the said property... for the total sum of $85,000.00, payable as mutually agreed by both parties.” Plaintiff's attempt to exercise the option was refused, and he sued for specific performance.

Although there was some disagreement between the parties as to whether the option clause had actually been contained in the agreement as signed, both the trial court and the California District Court of Appeals rested their decisions on the unenforceability of the alleged purchase option. The appellate court noted that the law had “progressed” to a point where the “[h]ornbook law that an agreement to make an agreement is nugatory” will be moderated by an effort to avoid the destruction of contracts for uncertainty, and to effect the intentions of the parties. The court declared, however, that California law “firmly” held that “failure to specify or furnish a standard for determination of terms of payment and method of securing the unpaid balance of the purchase price of real or other property is fatal to its enforceability notwithstanding any desire of the courts to be liberal and helpful.” Despite the testimony of the plaintiff that he was willing to be liberal and helpful to the extent of paying the entire price in cash upon his exercise of the option, the appellate court affirmed, denying the plaintiff any remedy.

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94 Id. at 313, 330 P.2d at 901.
95 Id. at 314, 330 P.2d at 901-02.
96 Id. at 315, 330 P.2d at 902.
97 Id. at 320, 330 P.2d at 906.
Although the court’s decision may be in harmony with California decisions generally, other courts have held otherwise, and it is tempting to argue that the plaintiff should have been entitled to a decree of specific performance, conditioned on his paying cash for the property, on the theory that the defendant could not reasonably complain if he received the best possible terms of payment. It is possible, however, that due to tax considerations full payment in cash would not have been completely satisfactory to the defendant. If so, there might still have been a contract to bargain. The plaintiff, to be entitled to a remedy, would have to show that the defendant was acting in bad faith by refusing to sell because he had changed his mind, received a better price elsewhere, or had been moved by a consideration unrelated to the attempt to agree upon a payment method satisfactory to both parties.

*Walker v. Keith* superficially resembles the *Roberts* case. In *Walker*, as in *Roberts*, plaintiff attempted to enforce an option provision contained in an otherwise valid and enforceable lease; the option, however, was to renew the lease for another five-year term. The property involved was a small lot, the rental originally being set at $100 per month. The renewal provision stated that:

> rental will be fixed in such amount as shall actually be agreed upon by the lessors and the lessee with the monthly rental fixed on the comparative basis of rental values as of the date of the renewal with rental values at this time reflected by the comparative business conditions of the two periods.\(^{101}\)

Plaintiff attempted to exercise the option, but the parties were unable to agree on a figure for the rent. Plaintiff sought specific performance, and the Chancellor, acting upon the verdict of an advisory jury, granted the requested relief, fixing the rental for the renewal term at $125 per month.

In reversing this decision, the Kentucky Court of Appeals noted that there was no Kentucky decision in point, and that decisions in other jurisdictions were “in hopeless conflict.”\(^{102}\)

Casting a disapproving eye on the parties’ failure simply to state a figure for the renewal term’s rent,\(^{103}\) the court went on to note

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\(^{98}\) See 1 A. Corbin, Contracts § 64 (rev. ed. 1963).


\(^{100}\) 382 S.W.2d 198 (Ky. 1964).

\(^{101}\) Id. at 199.

\(^{102}\) Id.

\(^{103}\) “[R]ental in the ordinary lease is a very uncomplicated item. . . . It, or a method of ascertaining it, can be so easily fixed with certainty. From the standpoint of stability in business transactions, it should be so fixed.” Id. at 199. This somewhat peevish tone recurs later:
that the language was ambiguous, and might be viewed either as an agreement to agree, or as an agreement that the rent should be fixed according to the standard referred to in the lease. In either event, the court held, the term was unenforceable. If viewed as an agreement to agree, "an agreement to agree simply does not fix an enforceable obligation." If viewed as referring to an objective standard, it would still fail because the standard was itself too vague to provide the missing figure.

It can easily be argued that the court should have held the agreement enforceable and upheld the Chancellor's findings as to the rent for the renewal term. Many courts would take this view; as we have seen, the Uniform Commercial Code in section 2-305 provides for such relief in an analogous situation. Under this approach, it then would not matter whether the provision in question was to be regarded as an agreement to agree, or an agreement to fix price by reference to specific external factors. In either case, the court would determine a "reasonable price" at the time (and place, presumably) for delivery.

This analysis of the contract, however, would not make it a "contract to bargain." As discussed above, the essence of a contract to bargain is that it binds each party only to negotiate in good faith and to refrain from withdrawing for an unrelated reason; it does not bind the parties to a "reasonable agreement" in the event that actual agreement cannot be reached by good faith negotiation. If the renewal option in Walker were really to be regarded as a "contract to bargain," however, it appears that the result might well have been the same, since the parties were apparently unable to agree on a figure for the renewal. The court would have had to consider the intention of the parties on these points, of course, in order to determine the proper characterization of the contract. Assuming the court would have been receptive to any of the approaches outlined above, the "reasonable price" approach of section 2-305 might well have been the most appropriate, since the plaintiff had already been in possession for

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Courts are called upon not to enforce an agreement or to determine what the agreement was, but to write their own concept of what would constitute a proper one. Why this paternalistic task should be undertaken is difficult to understand when the parties could so easily provide any number of workable methods by which rents could be adjusted. As a practical matter, courts sometimes must assert their right not to be imposed upon....

Id. at 204. Should a surgeon therefore undertake to remove the cancerous lungs only of certified non-smokers?

104 Id. at 201.

105 See cases cited at 1 A. Corbin, Contracts § 97 n.42 (rev. ed. 1963).

106 UCC § 2-305(1)(b).
five years and had probably relied on renewal. That the parties
had referred to external factors, at least suggests that they had
contemplated a "reasonable" rental, in light of prevailing eco-
nomic conditions at the time of renewal.\footnote{107}

\section*{B. Brokerage Contracts}

\textit{Thompson-McLean, Inc. v. Campbell}\footnote{108} involved a contract
between a broker and several co-tenants of a business property.
The broker, in an "exclusive sales agency contract," was granted
the right for a four-month period to sell the property at a stated
price. It was agreed that the broker was to be entitled to a five
per cent commission if he procured a purchaser, even if the prin-
cipals were unable or unwilling to complete the sale. However, the
agreement contained a provision that one of the sellers, P. L.
Campbell, would accept no more than twenty-nine per cent of the
price of his share of the property in cash as a down payment on
the sale. Campbell's purpose was to minimize the tax impact of
the sale. Plaintiff broker found a buyer willing to pay the total
price, who offered to buy Campbell's share for twenty-nine per
cent in cash and the balance in installments as Campbell should
direct, with interest at six per cent. The other sellers accepted the
buyer's offer, and eventually sold, but agreement was never
reached with Campbell, and the buyer never purchased Campbell's
share of the property. An action was brought against Campbell
by the broker, which claimed to be entitled to the five per cent
commission on Campbell's share of the property, even though the
sale was never consummated.

Reversing the trial court, the Supreme Court of North Caro-
lina held that the plaintiff had failed to establish its right to the
commission. Although the evidence was conflicting and somewhat
confused, the court concluded that either Campbell never fixed
his terms for sale—in which case no agreement binding on Camp-
bell was ever concluded—or he did fix such terms but they were
never accepted by the buyer—in which case the brokerage con-
tract became enforceable but plaintiff failed to earn his commis-
sion because a buyer willing to purchase on defendant's terms
had not been produced.\footnote{109} The facts as described by the court

\footnote{107 A similar case is Young v. Sweet, 266 N.C. 623, 146 S.E.2d 669 (1966); here the agreement does not have the possibility of an agreed "standard" as did the lease in \textit{Walker v. Keith}; the likelihood of reliance and of bad faith on defen-
dant's part seem much clearer, however, suggesting again that a "reasonable"
rental might well be implied.}

\footnote{108 261 N.C. 310, 134 S.E.2d 671 (1964).}

\footnote{109 Id. at 316, 134 S.E.2d at 676.}
are similar to those of the *Roberts* case. Here again, it may be that the actual intention of the parties was to make a contract to bargain, with the variation that defendant's duty was to bargain not with the plaintiff broker, but with the prospective buyer. Under this view of the case, it appears that plaintiff still would have failed to prove a right to its commission, since the sale was apparently lost because the buyer, after bargaining with defendant, withdrew his offer.  

In *Alaimo v. Tsunoda* an exclusive listing agreement was also at issue. Plaintiff broker had been granted the exclusive right to sell during a six-month period, for a five per cent commission, but the agreement provided that the sale price was to be determined by the sellers within ninety days after the signing of the agreement; the delay was to permit plaintiff to prepare a plan for subdivision of the property, for which services plaintiff was to receive $250 per month for a four-month period, as an advance against the first commission earned from any sale. The plaintiff performed the specified services, and received the $1,000 as provided. The defendants never set a price for the land, however, and when plaintiff secured a potential buyer for $240,000, defendants refused to sell for any price, notifying the plaintiff of their intention to remove the land from the market. Plaintiff sued for damages, claiming defendants had breached their contract. The trial court dismissed the complaint, and the California District Court of Appeals affirmed, holding that the agreement, because it failed to specify a price for the property or a method by which price could be determined with certainty, was too indefinite to be enforced. The court refused to use the market value of the land as the sale price for the purpose of enforcing the agreement since the agreement itself made no reference to market price; the court pointed out that many owners of real property are unwilling to sell for the market price. Plaintiff had conceded—perhaps unwisely—that under the agreement defendants could properly have fixed an exorbitant price, which no buyer would have paid, leaving plaintiff with no basis for complaint: "*[T]his,*" the court concluded, "*illustrates the illusoriness of the contract.*"  

The court aptly stressed the "illusory" nature of the agreement; the defect of the provision was not that it amounted to an

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10 Cf. Landow-Luzier Co. v. Grey, 34 Misc. 2d 1061, 232 N.Y.S.2d 247 (Sup. Ct. 1962), also involving a brokerage contract, which held that defendants had an implied "good faith" obligation not to interfere with plaintiff broker's attempt to negotiate on their behalf.  


112 Id. at 101, 29 Cal. Rptr. at 810.
“agreement to agree,” but that it was similar to the classic illusory agreement: I'll sell to you if I want to. If one party to an agreement makes only illusory commitments, the whole agreement is unenforceable for lack of consideration. Where the agreement otherwise contains enough consideration on both sides to make it generally enforceable, as in Alaimo, the illusory promise remains unenforceable simply because it promises nothing. If the court is correct in interpreting defendant's promise to be: "We'll state a price for our property if we want to sell it," then the decision is obviously correct.

The facts as stated, however, suggest that the promise of the defendants should be interpreted as a promise to state a price, with no implied qualification of willingness to sell. As noted above, the agreement itself recites that the decision on price is being delayed, not because the defendants were deciding whether or not to sell, but because they were awaiting the results of the plaintiff's study of the situation. Should the court have held the defendant liable if the plaintiff had been able to find a buyer at a judicially determined "reasonable" price?

If the approach of U.C.C. Section 2-305(3) were to be employed, the answer would clearly be yes; it states: "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." This would appear to include the case where the price is to be fixed by one party who is at fault in failing to so fix it; the Code declares that the price may then properly be fixed at a "reasonable" figure.

Can the agreement in Alaimo be properly viewed as a con-

113 The court so characterizes it. Id. at 99, 29 Cal. Rptr. at 808-09.
115 See note 64 supra. The writer has elsewhere suggested that an illusory promise should be good consideration if consciously bargained for. The real defect of such a promise is that it is itself unenforceable, not that it necessarily makes a "real" promise given in exchange also unenforceable. See Knapp, Contracts, 1966 Ann. Survey Am. L. 133, 136-38.
116 A similar analysis might be made of the facts in Professional Facilities Corp. v. Marks, 373 Mich. 673, 131 N.W.2d 60 (1964), involving an agreement to pay a finder's fee for investment funds to be procured by plaintiff for defendant's projected nursing home. Defendant agreed to pay a stated percentage on all funds "requested or accepted" by him, but never "requested or accepted" any. In that case, however, a promise to request some amount probably should not have been implied, because plaintiff could not reasonably have understood defendant to be fully committed to the enterprise. In the Alaimo case, however, plaintiff may well have understood that defendant was committed to proceeding with the sale, so that the only decision left to be made by the defendant was what the sale price should be, not whether there should be any sale at all.
tract to bargain? A contract to bargain only binds the parties to negotiate further, and does not guarantee agreement or a court-fixed "reasonable" term in the event of failure to reach such agreement. A brokerage contract—not a contract of sale is involved here, and it would be improper to say that this brokerage contract binds the owner to sell the land at a reasonable price, the result dictated if the broad principles of 2-305 were to apply.

It seems perfectly proper, however, to suggest that the contract binds the owner to pay a broker's commission if a buyer can be found who will pay a reasonable price—at least if the seller has refused to state in good faith what price he would accept. Viewed in this light, the brokerage contract really is a contract to bargain, in a limited sense; it is a contract to commence bargaining. It does not necessarily bind the buyer to continue negotiating toward a sale, but it does bind him at least to state, in good faith, his initial negotiating position. If he refuses, it seems reasonable to hold him liable for a commission based on a reasonable asking price, if a would-be buyer at that price was or could have been procured.\footnote{117}

\section*{C. Contracts for Services}

The following three cases serve to clarify the line between the contract to bargain and transactions which closely resemble but do not actually fall within that category.

\textit{Wagner v. Rainier Mfg. Co.}\footnote{118} centered on an alleged contract binding the defendant to employ the plaintiff as a logger. The latter had initially notified the defendant of a prospective sale of timber by the Federal Government; plaintiff had also offered to build the necessary roads, and cut and haul the lumber for a stated price per thousand board feet of logs. After sale of timber to defendant, plaintiff submitted a written proposal offering to do the job at the previously specified price. A meeting was held at which no agreement was reached, and plaintiff eventually asked the defendant's agent for some "assurance" that he had the job. The defendant then wrote plaintiff a letter, stating that his bid was considered "favorable," and adding:

\begin{quote}
We will have our attorney draw up a contract covering points generally outlined in your Plywood Products Timber Company contract.
\end{quote}

\footnote{117}{The conclusion reached in the text can be resisted on the ground that plaintiff's services in making the survey were separately compensated. However, plaintiff is not seeking to be compensated for those services, but rather for procuring a buyer for the property.}

\footnote{118}{230 Ore. 531, 371 P.2d 74 (1962).}
We shall need a performance bond, and no doubt a financial statement. However, we can discuss these points later. This memo will give you an assurance that we will work out this matter with you subject to such points as our attorney brings up.110

A month later Wagner received a second letter from the defendant informing him that another logger had been given the job.120 Wagner then brought an action for damages, claiming a breach of contract. The trial judge submitted the issue of contract vel non to the jury, denying defendant’s motion for a directed verdict; the verdict and judgment were for plaintiff.

In reversing, the Supreme Court of Oregon held that the writings exchanged by the parties clearly revealed the absence of a contract, the defendant’s acceptance not being definite and unequivocal. The mere reference to plaintiff’s bid as “favorable” was ambiguous, and the reference to financial statements and other points which defendant’s attorney might “bring up” indicated that final agreement was to be conditioned on such factors.

This all may be so. It is difficult, however, to ignore the following statement in Justice Rossman’s concurring opinion: “The plaintiff’s bid was never accepted even though the defendant evidently sought to create in him false hopes while it was negotiating a contract with someone else.”121 The plaintiff probably wished to know with some degree of certainty that his offer was going to be accepted so that he could begin making necessary arrangements for the work to be done, possibly incurring substantial expenses in connection therewith. If the plaintiff asked for such “assurance” in writing, and the defendant responded with a letter stating in part, “This memo will give you an assurance that we will work out this matter with you subject to such points as our attorney brings up,” might the plaintiff interpret that letter as giving him the requested assurance? And might he then incur substantial expenses on the assumption that his only risk of losing the contract would be a failure to reach agreement with Rainier’s attorney on the details of the contract? It is submitted that both of these questions be answered in the affirmative. Should the defendant then be liable if in bad faith it awards the job to

110 Id. at 535-36, 371 P.2d at 76.
120 I regret to advise you that we have arranged with other parties to contract the logging of the timber we purchased. . . . We wish to state that your bid was favorable and that our decision was influenced [sic] by our having had many years of satisfactory dealings with the parties engaged.
121 Id. at 545, 371 P.2d at 80.
someone else, for some reason entirely unconnected with the process of negotiating a contract with the plaintiff? The only difficult question is whether the plaintiff’s relief should be confined to reliance damages, or should extend to the whole expectation on the contract as well; we shall return to this point below.\textsuperscript{122}

\textit{Oil Trading Associates, Inc., v. Texas City Refining, Inc.,}\textsuperscript{123} by contrast, presents little or no opportunity for hand-wringing over the plight of the plaintiff, but does offer a chance to define the contract to bargain with greater precision. Plaintiff had been employed as exclusive agent for the sale of the entire output of defendant’s oil refinery. The contract apparently was for an indefinite term, but it contained the following clause:

This contract shall terminate on or upon any date after December 31, 1953 upon twelve months’ written notice by either party to the other, provided that prior to the giving of such notice the parties have not been able, within a period of not more than ninety days of negotiations, to agree upon a renewed or revamped contract or a mutually satisfactory termination date.\textsuperscript{124}

When the contract had been in force for slightly more than a year, the defendant wrote plaintiff a letter calling for commencement of negotiations “looking toward agreement upon a renewed or revamped contract,”\textsuperscript{125} in accordance with the paragraph quoted above. There was apparently only one meeting between the parties’ officers; at any rate, no “renewed or revamped” contract was agreed on, and a year’s notice of termination was sent by defendant at the end of the ninety-day period following the first letter. Admitting that no new agreement had been reached, plaintiff nevertheless brought suit claiming compensation from the defendant on the theory that the quoted language imposed on the defendant a duty to bargain in good faith toward a revised agreement, failure to do so invalidating the notice of termination. Defendant moved for summary judgment on the ground that no substantial issue of fact existed.

Assuming, for the purpose of the motion, that no meaningful

\textsuperscript{122} It might be noted that the Wagner case contains some of the features of Hoffman v. Red Owl Stores, Inc., since it too is somewhat open to analysis as being only binding “one way”—against defendant Rainier, but not against plaintiff Wagner had the latter chosen to back out. Wagner, however, sent a contract form along with his letter requesting assurances; it seems reasonable to suggest that he too should have been bound in good faith to negotiate a contract with Rainier along the general lines of that submitted contract. Id. at 541, 371 P.2d at 78, describing the contract submitted.

\textsuperscript{123} 199 F. Supp. 829 (S.D.N.Y. 1961), aff’d, 303 F.2d 713 (2d Cir. 1962).

\textsuperscript{124} Id. at 830.

\textsuperscript{125} Id.
negotiations had taken place during the period in question, the United States District Court nevertheless granted the defendant's motion, basing its decision upon a finding that the contract by its terms imposed no such duty to bargain in good faith, and also upon the observation that agreements to negotiate, in ordinary commercial situations, are "unenforceable." As to the former point, the clause in question merely afforded a time during which renewal terms might be discussed "if both sides are desirous of entering into negotiations," in order to avoid a summary dismissal "without advance warning and without opportunity for negotiation." Were the court to adopt plaintiff's suggestion that the contract imposed an obligation to negotiate in good faith, it would be "rewriting the contract," something which the court "obviously cannot do."

The court's disposition of the case is a sensible one. Arguably, the reference to the parties being "able" to renegotiate the contract implies some duty to do so. However, negotiation resulting only in a different "mutually satisfactory termination date" was an equally permissible alternative to renewal, which seems to negate the idea that the clause was designed to push the parties toward a continuing, if altered, relationship. It should not have been necessary to endorse the general proposition that an agreement to negotiate is per se unenforceable in order to decide this case for the defendant; the court may well have been right in concluding that in any event no such duty was intended by this contract.

In Sandeman v. Sayres plaintiff sued for a bonus claimed to be due under his contract of employment as national sales manager for defendant, a seller of "do-it-yourself" furniture. After providing for a $750 monthly salary, the agreement in question, a letter drafted by plaintiff (perhaps to demonstrate his enthusiasm for defendant's operation), contained the following:

Commission and/or Bonus. A suitable incentive in this category will be paid you and will be decided upon, after the first three (3) months of our marketing operations of Sayrecrest products, commencing July 1st, 1953. This period of time is specified to enable us to properly evaluate the market and acceptability of our products. Such commission and/or bonus arrangement, will be in addition to the salary stated above.

After plaintiff had been in defendant's employ for three months,

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126 Id. at 831.
127 Id.
128 50 Wash. 2d 539, 314 P.2d 428 (1957).
129 Id. at 540, 314 P.2d at 428.
he broached the subject of his "bonus and/or commission," but it was "mutually agreed" that the discussion was "premature." 1

Plaintiff's employment was eventually terminated (also by mutual agreement) after about a year, during the latter part of which he also served as a commissioned sales agent. He never received any commission or bonus with respect to his services as national sales manager, and during the entire period of his employment the company failed to show a profit, although it did have sales of over $200,000. Plaintiff sued to recover an amount equal to two and one-half per cent of such gross sales, as a "suitable, fair and reasonable bonus or commission." 2

The trial court found for plaintiff on all issues and awarded him judgment for the sum requested.

In reversing this decision, the Washington Supreme Court suggested a variety of reasons why the plaintiff might have no right to recover, pointing out that an agreement may fail to impose liability because it is too indefinite, illusory, or because it is only an agreement to agree, which requires a further meeting of the minds of the parties before it can be complete and enforceable. Apparently relying on the testimony of the plaintiff that the phrase "will be decided upon" required mutual agreement, the court settled on the third suggested reason, and found an invalid agreement to agree. 3

It is easy to find fault with the decision, since the court itself recognized that judgment could be rendered for a reasonable amount "if the parties had definitely and finally agreed that a bonus would be paid and that the amount, within reasonable limits, was to be determined later, and services were rendered in reliance thereon." Unless strong emphasis is placed on construing the writing against its drafter, the agreement in question is open to the reasonable construction that the parties had in fact so agreed. ("A suitable incentive ... will be paid you.... Such commission ... will be in addition to the salary stated above.") 4

The hard question is whether the Sandeman agreement falls into the category of a contract to bargain, or whether it is even stronger, binding the employer to pay a reasonable sum as determined by the court in the absence of actual agreement by the parties. The only stated reason for the delay in fixing the amount of the bonus was the need to evaluate "the market and acceptability" of the employer's products. The writer would suggest that

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1 Id.
2 Id. at 541, 314 P.2d at 429.
3 Id. at 543, 314 P.2d at 430.
4 Id. at 540, 314 P.2d at 428. See also cases cited in 1 A. Corbin, Contracts § 97 n.39 (rev. ed. 1963).
the agreement should be viewed as imposing a binding obligation to pay some amount as a bonus (either negotiated in good faith or fixed by the court), since the bonus decision is postponed until after the services leading to the bonus have, to a substantial degree, been rendered.\footnote{134} If the decision on a bonus rate had been postponed until a date subsequent to the making of the agreement, but prior to performance, then a contract to bargain could have resulted; failure to agree on the bonus rate would then have been a "deal-upsetting" point, releasing either party at will, but giving the plaintiff no cause of action for breach.

D. Contracts for Sale of a Business and Related Matters

The discussion to this point has sought to show that judicial recognition of the contract to bargain, as a preliminary stage to the formation of the ultimate contract, would probably change the outcome of a significant number of cases. One can only speculate, of course, as to how many claims stemming from the bad faith breach of a contract to bargain were never pressed to litigation, simply because of the seemingly impenetrability of the law in this area. In the class of cases in which recognition of the contract to bargain would not alter the result, it would nonetheless have a salutary effect, permitting the court to place greater emphasis on policy factors which have had relatively little notice in the opinions.

Hammond & Taylor, Inc. v. Duffy Tingue Co.\footnote{135} involved a contract for the sale of the assets and good will of defendant corporation's oil distributing business. The agreement of sale, drawn by defendant's agent without the aid of an attorney, provided that the seller would "cooperate with the Purchaser in the takeover of the business operation and handling of the accounts involved, even to the extent of [causing seller's president, Tingue, to enter] \ldots the employ of the Purchaser on terms to be mutually agreed on."\footnote{136} The agreement was never carried out because of a dispute that arose over the buyer's demand for an escrow arrangement, insuring the president's faithful performance of his contemplated duties. Plaintiff brought suit for reformation of the contract\footnote{137} and return of a $2,500 deposit made in connection with the execution of the agreement.

\footnote{134} Compare 1 A. Corbin, Contracts § 99 (rev. ed. 1963) discussing quasi-contractual remedy where plaintiff's performance is complete.
\footnote{135} 39 Del. Ch. 174, 161 A.2d 238 (Ch. Ct. 1960).
\footnote{136} The agreement actually provided only that defendant seller would enter the employ of plaintiff; the agreement was reformed at trial in the manner indicated in the text. Id. at 176, 161 A.2d at 239.
While there was some evidence that the parties had later orally agreed on the terms of the proposed employment agreement, this issue was resolved against the defendant, the court finding the agreement not binding and awarding plaintiff a return of its deposit. The provision in question was "almost the classic example of a legally unenforceable provision because it is nothing but an agreement to agree in the future without any reasonably objective controlling standards provided."

All parties stated, and the court obviously agreed, that continued association of the seller's president with the business was of vital importance to the buyer, which was acquiring good will as well as other assets. The terms on which that association was to continue presumably were also of vital importance to Mr. Tingue himself, and by inference to the seller, a corporation over which he appears to have exercised control. Thus it might appear that this arrangement was at most a contract to bargain, since the unresolved points were too important to leave to court determination in the event of good faith disagreement. Even if it had been considered a contract to bargain, however, the result in the case would very likely have been the same, since the Chancellor appeared to find that the parties had simply been unable to reach agreement. Furthermore, "no bad faith on either side" was found. While bad faith in connection with a contract to bargain may be different in application from bad faith in the context of an "agreement to agree," the court at least considered the merits of the parties' conduct during their attempts to reach agreement. If the court had considered the possibility of a contract to bargain, however, it might have devoted more attention to the question of the parties' good faith, and the issue might not have been relegated to a ten-word sentence in a two-page opinion.

Betty Lee Shoes, Inc. v. Karl's Shoe Stores, Ltd. also involved an employment contract in connection with a sale of assets, but the proposed agreement was important to the principals for reasons quite different from those in the Hammond case. Sam Lichenstein was the owner of virtually all the capital stock of Betty Lee Shoes, a corporation which owned and operated shoe stores in Austin, Texas. Lichenstein entered into negotiations for the sale of Betty Lee's assets to defendant, Karl's Shoe Stores.

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138 The court concluded that the terms of employment and hours per day had not been agreed upon, finding against the defendant because its agent drew the agreement (although it is difficult to see how one relates to the other) and because "equity abhors a forfeiture." Id. at 177, 161 A.2d at 240.

139 Id. at 176, 161 A.2d at 239.

140 Id. at 177, 161 A.2d at 240.

141 293 F.2d 429 (5th Cir. 1961).
Karl's was willing to pay a total of $115,000 for the business, but insisted that $60,000 of this total be allocated to a five-year, $1,000 per month "non-cancellable" employment agreement with Mr. Lichenstein, in order that the sums so paid could be treated for income tax purposes as business expenses. When initial agreement was reached, the parties signed two documents, one for the sale of the assets, the other providing generally for an employment contract which was to be entered into if the sale of assets were consummated.\(^4\) Although the parties continued to negotiate the terms of the employment contract, they apparently never reached a final agreement; Lichenstein was most concerned that he be protected against any arbitrary cancellation by the buyer, while the buyer was becoming more and more concerned with achieving the desired tax status for the sums to be paid as salary to Lichenstein. The buyer eventually withdrew from negotiations and stated that the deal was off. Betty Lee, Lichenstein and the other stockholders of Betty Lee brought suit for damages in United States District Court. The trial judge, without opinion, granted summary judgment for defendant.

The Court of Appeals for the Fifth Circuit, in affirming the decision, addressed itself principally to two questions: whether the signed document referring to the proposed employment agreement was sufficiently definite to be enforceable, and, if not, whether any enforceable agreement on the matter had subsequently been reached. Holding against plaintiff on both points, the court pointed to a number of deficiencies in the initial agreement (failure to specify duties, place of performance, and amount of time to be devoted) and stated that the writing was only an agreement to make a contract.

It is impossible to judge the factual issues from the opinion, although some of the facts alleged suggest a fair amount of pressure and sharp practice by the defendant, resulting in considerable hardship to the plaintiff.\(^4\) It is by no means clear, however, that characterization of this transaction as a contract to bargain would necessarily have changed the result of the case. The court stresses the fact that the tax treatment of the purchase price was of the utmost importance to the buyer. This was known to the seller from the start, and the deal fell through apparently because the buyer was unable to get agreement on the type of contract he deemed necessary for tax purposes.\(^4\) If this had been a contract

\(^{142}\) Id. at 430-32.

\(^{143}\) Id.

to bargain, the court might have found that the defendant bargained in good faith—or, at least, in faith as good as that displayed by plaintiff—and was therefore subject to no liability.145

What of plaintiff's reliance on the alleged representations of defendant's agents that the deal was sure to go through? This may properly go uncompensated, since each party in a contract to bargain should realize that good faith bargaining is no guarantee of agreement. In relying on a contract of this sort, a businessman takes the calculated risk that if agreement cannot be reached, his reliance will not be protected.146 If the deal fails for a different reason, however, this is not within the risk he has consciously incurred, and he should be compensated. Use of the "contract to bargain" device in a case such as Betty Lee would enable the court to direct its attention not merely to the indefiniteness of the agreement, but to the defendant's good faith—or lack of it—in withdrawing from the proposed exchange.

A third case of this general type is Borg-Warner Corp. v. Anchor Coupling Co.,147 in which plaintiff was seeking specific performance of an alleged contract for sale of the assets of a manufacturing business. Defendants were the manufacturing company, Anchor Coupling Co., and its chief officers and major stockholders, Charles Conroy and Walter Fritsch. The contract was said to be contained in letters of offer and acceptance, written on behalf of Anchor and Borg-Warner, respectively. Conroy later refused to perform under the contract, and this action followed. Defendants Anchor and Conroy moved to dismiss plaintiff's complaint, arguing that Anchor's original letter to plaintiff could not form the basis of a contract, despite the later acceptance. The letter, referring to earlier correspondence from Borg-Warner, affirmed Anchor's intention to enter a contract in accordance with the general terms set out by Borg-Warner, but added certain prerequisites. "[S]uitable assurances" would have to be given "for the retention of the lower level executive personnel" of Anchor, and "mutually satisfactory arrangements" would have to be made "for the continued employ of Charles L. Conroy."148 The trial court granted defendant Anchor's motion to dismiss, on the ground that no contract existed.

145 "The parties worked diligently in an effort to draw up an employment contract which both would be willing to enter into—which would be 'satisfactory,' to both parties. This they were never able to do." Betty Lee Shoes, Inc. v. Karl's Shoe Stores, Ltd., 293 F.2d 429, 436 (5th Cir. 1961).
147 16 Ill. 2d 234, 156 N.E.2d 513 (1958).
148 Id. at 238, 156 N.E.2d at 515.
The Supreme Court of Illinois, two Justices dissenting, reversed and remanded, holding that the parties were not confined to the terms of the writings by the Parol Evidence Rule because of their ambiguity. The court noted that both the plaintiff and defendant Fritsch had indicated an intention and a belief that a binding contract had been made by the exchange of correspondence. Interpreting the facts in the light most favorable to plaintiff, the court held that a binding contract could be found to exist—one which was not too indefinite for specific performance, because the “mutually satisfactory arrangements” required to be made for Conroy could be taken to mean “reasonably satisfactory.”

Two separate dissents were filed. Justice Bristow, arguing that both the Statute of Frauds and the Parol Evidence Rule barred any reference to extrinsic evidence for the purpose of ruling on the validity of the contract, cited the allegations and documents included in the pleadings as proof that no agreement had ever been reached on the terms of Conroy’s employment by Borg-Warner. Justice Schaefer agreed, and also pointed out that there was no indication from the pleadings of any agreement on arrangements for retention of “lower level executive personnel.” For both these reasons, Justice Schaefer argued, the trial judge’s decision should be affirmed.

A better case could hardly be imagined to demonstrate the dilemma created by the common law for the judge concerned both with justice to the parties and with well-structured legal reasoning. While a majority of the court was persuaded by the parties’ intention to make a binding agreement at the time they exchanged the letters, they were forced to take the position either that the contract was complete and binding in the absence of provisions for continued employment of personnel, including the second-largest stock-holder, or that the whole agreement was binding and enforceable—even specifically enforceable—despite the failure of buyer and seller to reach final agreement on the terms of continued employment. As Justice Schaefer points out, the selling company must have been concerned with the welfare of those personnel, and indeed Conroy himself must have been vitally con-

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149 If the parties cannot agree, proof of Conroy’s present terms of employment, of the prevailing rates of compensation and other terms of employment of persons in a similar standing in similar businesses, and of established prior practices at Anchor, would enable a court or jury to fix reasonable terms of employment.
Id. at 245, 156 N.E.2d at 518-19.
150 Id. at 252-53, 156 N.E.2d at 933.
151 Id. at 246, 156 N.E.2d at 930.
152 Id. at 242, 156 N.E.2d at 517.
cerned over the prospects for his continued employment. Justice Schafer, arguing against the imposition of liability, was forced to take the position that the plaintiff should not even get to the jury, despite the allegation that the parties believed they were concluding a binding contract, acted as though they believed it, and—with only one apparent exception—still believed it.

By contrast, applying the contract to bargain framework to such a situation would permit the court to take notice of, and give effect to, the parties’ intention to create a relation which was, at least to some extent, legally binding. Second, it would save the court from inserting “reasonable” terms in the agreement where the terms are of such importance that they should only be decided by the parties. Third, it would direct the attention of the court to another important fact in the case: Why has the defendant refused to go through with the sale? If he has simply changed his mind, or now thinks a better price can be found elsewhere, then he should be liable to the plaintiff for breach of contract. If, however, he has withdrawn because negotiations have broken down on the terms of his employment contract, and he has bargained in good faith, then he should be subject to no liability.

Of course, the court may have properly characterized the agreement as a complete and fully binding contract. The common law, however, forces the court to choose one extreme or the other, and, by directing the court’s attention to the completeness of the agreement, the law diverts attention from the good faith of the non-performing party, which should be the most important question of all.

E. Contract for the Sale of Corporate Stock

Several cases involving contracts for the sale of corporate stock have raised problems of the sort under discussion. Pennsylvania Co. v. Wilmington Trust Co. is of particular interest because the court’s decision is based on U.C.C. Section 2-204.

In 1955, eighty-two per cent of the stock of the Toledo,
Peoria and Western Railroad was owned by two testamentary trustees in Wilmington, Delaware. The trustees possessed a power of sale, and in April, 1955, they met with representatives of the Pennsylvania Company (a wholly-owned subsidiary of the Pennsylvania Railroad Company) and the Atchison, Topeka and Santa Fe Railroad Company. While unwilling to buy all of the trustees' stock, the Pennsylvania and the Santa Fe were each interested in purchasing twenty-six per cent of the total stock outstanding. Each of the two companies wrote and delivered to the trustees a letter offering to purchase 23,400 shares of T., P. & W. stock at $100 per share. Each proposal was expressly subject to formal approval by the offeror's board of directors and such approval as might be necessary from the Interstate Commerce Commission. In addition, each letter contained a paragraph referring to "necessary details" which were to be worked out by the legal counsel of sellers and buyer. Acceptance of the offer was noted at the bottom of each letter on behalf of the trustees.

After the signing of these documents, formal "contracts" were prepared. No such documents were signed, however, because in the meantime the trustees had been approached by another bidder with an offer to buy all the stock held by the trustees at $133.33 a share. Some of the trust beneficiaries learned of this offer and insisted that the trustees had a fiduciary duty to accept the higher bid. After some initial reluctance, both trustees eventually took the position that the agreement evidenced by the letters of April 15 was not binding, and offered the stock to plaintiff and Santa Fe at a price above $133.33 a share. Plaintiff argued that the earlier agreement was binding, but Santa Fe offered to pay $135 a share for all the stock, and the defendants accepted its new offer. The sale was consummated. Pennsylvania then brought suit for specific performance or damages.

According to the Delaware Chancery Court, triable issues of fact existed which precluded summary judgment for either party. The major part of the Chancellor's opinion demonstrates why the defendants were not entitled to summary judgment. Citing the Code comment to section 2-204(3), and other author-

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155 Pennsylvania's letter read in part as follows: "It is understood that all necessary details to implement this will be worked out by our respective Counsel." Similar language in the Santa Fe letter included a reference to "all necessary details, including a purchase agreement." Id. at 455-56, 166 A.2d at 728. There is no indication that absence of an express reference to the contemplated purchase agreement in the Pennsylvania letter had any influence on the court's willingness to find an existing contract between Pennsylvania and the trustees.

156 Article 2 of the UCC, by its terms, applies to "transactions in goods." UCC § 2-102. Although the term "goods" is defined by § 2-105(1) to exclude corporate stock "investment securities"), Comment 1 to that section suggests that
ity, the court expressed the opinion that the statute was intended to apply not only where "minor" terms were left open, but also where the terms were important, the only question being whether the parties intended "to make a contract." Although the facts were in dispute, there was sufficient evidence of intention to create a triable issue of fact as to whether the parties had intended, by signing the April 15 letter agreement, to "make a contract."

That being so, the only remaining obstacle to application of U.C.C. Section 2-204(3) was finding "a reasonably certain basis for giving an appropriate remedy." Defendant argued that the agreement was too indefinite to allow any "appropriate relief," but the court reasoned that the "definiteness" problem did not preclude awarding relief. Since the plaintiff had indicated its willingness to be satisfied with a damage remedy, a contract too indefinite for specific performance might still be susceptible of enforcement by means of damages. The court presumably meant to imply that an appropriate remedy for the plaintiff would be the standard "expectation remedy"—the difference between "contract price" ($100 a share) and "market price." If the sale price should be considered the "market price," plaintiff's prospective remedy would exceed $800,000, a figure which plaintiff, at least, would undoubtedly have characterized as "appropriate."

There is no need to quarrel with the outcome of the decision. Notice, however, the extent to which the court—even particular sections of article 2 should by analogy apply to cases involving investment securities, when "the reason of that section makes such application sensible" and the case is not covered by article 8. This case would thus appear to have been an appropriate one for such an application of § 2-204(3)."
with the aid of the Uniform Commercial Code—was trapped by the all-or-nothing dichotomy of the law of contract. The language is clearly wrong; the result is clearly right. In order to hold defendants liable for breaking a binding contract with plaintiff, the court had to cite the letter agreement between the parties as evidence of a fully-binding contract. The inescapable conclusion is that if the parties should—in the course of agreeing on "all necessary details"—fail to agree on some term, either party could seek legal enforcement of the letter agreement, and the court would decide how the "necessary detail" should be resolved. Note, however, that the letter agreement contained just four terms: the price; the subject matter of the sale; the identities of the parties; and the "understanding" that the T., P. & W. would continue to operate "as an independent organization." Given the multitude of points which attorneys for either side undoubtedly would raise in the course of working out a detailed agreement, and the seriousness with which failure to agree on some of those points would be regarded by one side or the other, it is inconceivable that the letter agreements should be sufficient to make the sale of stock "unstoppable." What is conceivable, however, is that the defendants should have been held accountable if they withdrew from the transaction for the sole purpose of getting a better price elsewhere, as they apparently did. If the agreement of April 15 were regarded as a contract to bargain, the court would no longer be forced to choose between doing justice and talking sense. Regardless of whether the sale would have been completed, the evidence was sufficient to show each party so committed to the basic terms of the proposed exchange that each was bound to attempt in good faith to agree on the remaining terms. Defendants clearly breached that obligation by their bad faith insistence on a higher price.

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SOME ASPECTS OF THE CONTRACT TO BARGAIN

A. Intention

What manifestation of intention will serve to create a contract to bargain? The essential question is whether the parties have expressed both satisfaction with and commitment to the essential terms of the proposed transaction, to the extent that each would reasonably regard the other as unjustified in withdrawing for any reason other than a failure—after negotiation in good faith—to arrive at a complete and final agreement. The above cases suggest that the most likely source of such manifestations of intention will be a writing or series of writings executed by the parties. The common law, of course, has traditionally insisted that elaborate writings similar to those in *Joseph, Alaimo, Wagner* or *Hammond* should be without any legal effect whatsoever.

Nonetheless, a contract to bargain should not be held to exist merely because the parties have reduced one or more fully negotiated terms—however important—to writing. The additional element of willingness to be bound must also appear, either from the words of the writing itself or from the surrounding circumstances at the time of its preparation. In light of the legal and was permitted to recover over $250,000 damages for defendant's breach of a contract to purchase a motion picture to be produced by plaintiff. No formal contracts were ever signed, although the most basic terms of the transaction were agreed upon; the "deal" was concluded amidst a flurry of handshakes and "we have a deal" assurances. Defendant apparently withdrew because Gregory Peck was not going to star in the film, despite defendant's earlier agreement that Peck's appearance was not essential to the deal. Although an earlier contract had been referred to as a basis for the new one, the latter would nevertheless have been quite complex; given the size of the figures involved, a court might well have found no enforceable agreement if bargaining had eventually foundered on one of the points not expressly agreed upon earlier. Cf. *Carter v. Milestone*, 170 Cal. App. 2d 189, 338 P.2d 569 (Dist. Ct. App. 1959).

An additional problem (of particular importance in the "agreement-to-agree" cases supra note 39) exists where the contract to bargain is only one part of a larger agreement, the remainder apparently being complete and effectual despite a present lack of complete agreement on the remaining bargaining points. If a breach of the contract to bargain occurs at a time when the rest of the contract remains executory (in whole or part), the court will be faced with the additional problem of deciding whether the contract to bargain is severable from the remainder of the contract. Cf. *Dunlop v. Laitsch*, 16 Wis. 2d 36, 113 N.W.2d 551 (1962), involving an agreement between two adjoining landowners to share the cost of a dam designed to create a lake on both their properties, where the parties proved unable to agree on the level at which the lake was to be maintained.

This is, of course, one important difference between the contract to bargain and the conventional contract; in the latter, the intention to be legally bound need not be affirmatively shown as a separate element of the agreement, but will be inferred from its completion. See 1 A. Corbin, *Contracts* § 34 (rev. ed 1963). In the case of the contract to bargain, however, where the intention to be at least
practical significance attributed to the execution of a written agreement, however, it is not unreasonable to suggest that since the parties have taken the trouble to embody their partial agreement in a signed writing, the court should at least recognize the possibility that they intended to create some binding relation.\footnote{106}

No court, however, should lightly engage in speculation about the possible intention of the parties; the burden of proof should be on the proponent of a contract to bargain, just as it is on the proponent of any contract. On the other hand, the burden of proof should be no greater than for any other contract, and—leaving aside such requirements as the Statute of Frauds—the proponent should not be precluded from relying on oral manifestations of intention.\footnote{106}

\section*{B. Good Faith Bargaining}

What sort of conduct will be regarded as “bad faith” in the context of a contract to bargain?\footnote{107} The opinions discussed above were for the most part not concerned with this factor; in a number of cases one simply cannot tell from the court’s opinion why the defendant withdrew from the transaction. Withdrawal merely because a better offer has been received from a third party—as in the Wagner and Pennsylvania cases—seems the most obvious case of bad faith. Somewhat less obvious, but an example of bad faith nevertheless, would be a withdrawal, as in Alaimo, for no reason other than a change of heart.\footnote{108} On the other hand, with-

\footnote{106} Although the existence of a memorandum of terms agreed upon may itself have important consequences, as discussed in note 166 infra, there is a vast difference, so far as evidence of intention to contract is concerned, between a mere notation of agreed-on-terms and a formal document executed by both parties.

\footnote{107} In a recent article, Professor Summers has pointed out that the term “good faith" functions as an “excluder," having no general meaning of its own but serving to refer to the absence of a number of different types of proscribed conduct, all of which may generally be referred to as "bad faith." Summers, “Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code, 51 Va. L. Rev. 195, 199-207 (1965).

\footnote{108} The statement in the text is perhaps a bit too glibly dogmatic; there may be cases where plaintiff can properly be held to have borne the risk of defendant’s decision to forego the transaction altogether, but not the risk of his entering into a substitute transaction.
drawal after substantial negotiations have failed to produce agreement on the reserved terms—as may have been the case in *Walker, Hammond* and *Betty Lee*—should not be regarded as bad faith, and should produce no liability on the part of the withdrawing party.\(^{169}\)

Consideration of the “good faith” standard for performance of the contract to bargain suggests two related objections which may be raised to judicial recognition of such contracts. The device may be used to penalize a party merely for “insufficient bargaining.” There is, of course, some danger that a party’s withdrawal from a contemplated transaction after what he regards as a complete breakdown of negotiations might later be viewed as a failure to bargain long enough, or “reasonably” enough, thus constituting a breach of contract. Plaintiff, however, bears the burden of proof both as to the existence of a contract and as to its breach. In the absence of any additional factors to indicate bad faith (such as acceptance of a better offer from a third party), a court might well find that plaintiff had failed to demonstrate defendant’s lack of good faith.

This leads to the second objection that whenever an extraneous factor, such as a better offer from a third party, makes withdrawal from the contract materially advantageous to one party, that party runs the risk of being held liable even if he withdraws from the transaction only after extensive bargaining has failed to produce a complete agreement. Two factors, however, seem to minimize the likelihood of such occurrences. One is the possibility of creating a record of bargaining sufficient to demonstrate that agreement clearly could have been reached had the plaintiff

\(^{169}\) There is a statutory duty to bargain in good faith in the area of labor contracts. See generally Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401 (1958). One suggested definition of “bad faith” in this context is a “desire not to reach an agreement.” NLRB v. Reed & Prince Mfg. Co., 205 F.2d 131, 134 (1st Cir.), cert. denied, 346 U.S. 887 (1953); see Cox, *The Duty to Bargain in Good Faith*, 71 Harv. L. Rev. 1401, 1417 n.57 (1958). This statutory duty does not depend for its existence on any agreement of the parties and is very different from the duty which should be imposed by a contract to bargain. It may be, however, that some labor cases can provide useful analogies for the court faced with a contract to bargain case. Professor Cox has noted, for instance, that the following types of conduct have been held to be evidence of employer bad faith: “Stalling the negotiations by unexplained delays in answering correspondence and by the unnecessary postponement of meetings,” “repudiating the commitments made by the company's bargaining representative after it had led the union to believe that he had full authority to conclude an agreement,” “withholding agreement upon trivial matters,” “failure to make counterproposals,” “[advancing] demands so obviously intolerable to the union as to suggest a purpose to obstruct negotiations.” Cox, supra, at 1418-22. All these appear to have potential application to the commercial contract to bargain.
really desired it; second, even those courts willing to recognize the contract to bargain will do so with extreme caution, and only where the justice of plaintiff's claim is virtually beyond question. These two factors suggest that a contract to bargain is likely to be enforced only where there has been either a unilateral withdrawal from negotiations or at least an insistence on terms so clearly unreasonable that they could not have been advanced with any expectation of acceptance, coupled with some demonstrable advantage to be gained by defendant in avoiding the contemplated transaction.

C. Remedy for Breach

What sort of remedy should be available for the breach of a contract to bargain? No definitive answer will be attempted here; indeed, there is respectable authority for avoiding such an attempt.\(^ {170} \) The suggestion has already been made that the damage remedy in such a case should extend at least to reimbursement of the plaintiff's reliance expenditures; the plaintiff in Wagner surely deserved no less. The harder question is whether the plaintiff's remedy should always be confined to reliance, or should in some cases extend to full compensation for lost expectation.\(^ {171} \) The cases suggest certain factors which bear on this question:

Contract law generally imposes a requirement that damages claimed must be proved with reasonable certainty.\(^ {172} \) In the case of a contract to bargain, there may be greater uncertainty than in the usual case because of the failure to agree on a number of terms; this may prevent the award of an expectation remedy. In some cases, however, the main terms of performance, including quantity, quality and price, may have been so agreed upon by the time of breach that an expectation remedy can be computed with as much certainty as is usually required. This would appear to have been the case in Wagner v. Rainier Mfg. Co. Of course the disappointed seller may also have incurred expenditures which can be proved with certainty and could form the basis for his

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\(^{170}\) Restatement (Second) of Contracts § 90 (Tent. Draft No. 2, 1965) (remedy in promissory estoppel case may be limited "as justice requires"). Comment e to this section makes some suggestions as to the application of this very vague standard.


\(^{172}\) Restatement of Contracts § 331 (1932). This is, of course, only one of several rules designed to keep defendant's liability within reasonable limits; others include the requirements of proximate causation and foreseeability. See generally Note, Lost Profits as Contract Damages: Problems of Proof and Limitations on Recovery, 65 Yale L.J. 992, 997-1000 (1956).
remedy; however, the fact that he is clearly entitled to his reliance remedy should not preclude him from instead seeking his expectation remedy, any more than it does in the ordinary contract case.

Moreover, in many such cases, a full remedy for the plaintiff can be justified as necessary merely to protect the reliance interest. If plaintiff were the seller of goods or services, and defendant's withdrawal from the transaction allowed plaintiff to make a substitute sale of the same goods or comparable services, the plaintiff could properly claim the difference between defendant's proposed price and the price actually realized on the later sale. The plaintiff's remedy is actually earned by his reliance on the initial prospect of a sale to defendant. In cases where the plaintiff is the prospective buyer rather than the seller of goods or services, protection of his reliance interest again requires compensation for the higher price he ultimately is forced to pay.

It may be, however, that no substitute purchase by plaintiff has been or will be made. In this connection, consider again the Pennsylvania Co. case. There is no indication of any substantial reliance expenditures by plaintiff, and the value of plaintiff's expectation was probably impossible to prove. If the defendant had simply decided not to sell, and withdrawn the stock from the market, even a court which generally recognized the contract to bargain would be reluctant to award a remedy. However, in the actual case, defendant withdrew from the sale in order to make a sale to another buyer at a much higher price. Here a remedy can be constructed based on the difference between the "market price" (the price at which defendant made its sale) and the "contract price" (the price at which plaintiff had expected to buy). The remedy, although framed in conventional "expectation" terms, is not really computed with respect to plaintiff's own expectation of gain, since it is highly unlikely that plaintiff Pennsylvania would have bought the stock only to resell it to the rival bidder, a competing railroad. The award is better justified as based on unjust enrichment. Defendant had acted in outrageously bad faith and had profited magnificently; the court responded by holding that plaintiff might recover the amount of defendant's "windfall" profits, even though such a sum would never have been realized by the plaintiff had the original sale been consummated.

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173 The point that the reliance interest and the expectation interest may really be identical in such cases is made in Fuller & Perdue, supra note 171, at 74-75. Of course if the contract price is more favorable to plaintiff than the market price at the time of the contract to bargain, the expectation remedy will exceed a remedy computed solely on the basis of such reliance.

174 Although characterized in the text as based on "unjust enrichment," the remedy here is not based on protection of plaintiff's "restitution" interest, which
The preceding discussion has been concerned with the various measures of damages that might be employed for breach of a contract to bargain. Should such an agreement ever be specifically enforced?

Because of the peculiar nature of the contract to bargain, it is apparent that two types of specific performance are theoretically possible: specific performance of the bargaining process to which defendant had committed himself in the contract, and specific performance of the end-transaction which was to be shaped by the parties pursuant to their initial contract. It seems highly unlikely that a court would grant specific performance of the former type, given the inevitable lapse of time and the likely estrangement of the parties. In many cases an adequate remedy will be available without resorting to enforced bargaining; a court which recognizes the contract to bargain under Section 2-204 of the Commercial Code would probably not regard specific enforcement of this type as being "appropriate," even if no other remedy appeared "adequate."

What then of the second possibility? Should a court ever order specific performance of the exchange on terms which in its opinion would have been agreed on by the parties if good faith bargaining had actually taken place? The discussion above suggests that it should not, since the parties are not consenting to a third party's determination of what constitutes reasonable agreement as to the open terms. It has already been suggested that in some cases the essential terms of the contemplated exchange will have been so far agreed upon that a court could properly frame an expectation remedy in damages. In some cases the terms of that exchange will—by the time of defendant's breach—have been agreed upon in such detail that a court would be justified in rendering a decree of specific performance. If specific performance of the exchange is to be an available remedy for breach of the contract to bargain—even if only in exceptionally clear cases—does the contract to bargain amount to a "reasonable terms" contract, under another name?

usually implies that the benefit enjoyed by defendant was received from the plaintiff. Restatement of Contracts § 347, and comment b at 586 (1932) ; see Fuller & Perdue, supra note 171, at 53-55. As Professor Dawson has pointed out, however, there are some situations in which plaintiff is entitled to recover a gain realized by a breaching defendant, and it may be that the conventional "expectation" remedy in some cases is really based on such a factor although "unacknowledged." Dawson, Restitution or Damages?, 20 Ohio St. L.J. 175, 186-S9 (1959).

176 This, despite a discernable trend of courts to grant specific performance in unique situations. See Van Hecke, Changing Emphases in Specific Performance, 40 N.C.L. Rev. 1 (1961).

177 See text accompanying notes 85-88 supra.
Reference to Section 2-305 of the Uniform Commercial Code demonstrates that there is indeed an important distinction between the two types of contract. In the kind of "reasonable price" contract envisioned by 2-305(1), the parties are bound even if they are unable, after good faith negotiation, to agree on such a price. Once the contract has been made, therefore, a legal remedy becomes available to any party who is later disappointed by failure to consummate the exchange. In the contract to bargain case, a remedy would not be available unless the defendant was somehow at fault for the failure to agree. A genuine breakdown in negotiations will not discharge the "reasonable price" contract of 2-305(1); it would, however, discharge the contract to bargain.

V

CONCLUSION

It may well be argued that, whatever its disadvantages, the present clear demarcation between contract and non-contract at least has the virtue of certainty, and that to introduce the concept of a contract to bargain as a half-way house between the two will only create uncertainty, and thus breed litigation. The "floodgates" argument is heard whenever it is suggested that a remedy should be made available where it has previously been denied; this does not mean, however, that it always lacks validity. Here there are at least two contending considerations. The amount of uncertainty already prevalent in this area is, as a result of the existing law, not inconsiderable. To mitigate the harshness of the "agreement to agree" cases by introducing the contract to bargain concept may indeed create some additional uncertainty and thus increase litigation; however, the "uncertainty" would largely concern the proper remedy for deserving persons who are currently assured of no remedy at all. The change is not a development to be dreaded.

A franker response, however, is that in the area of commercial bargains between merchants, the floodgates argument is essentially a phony one. The vast preponderance of disputes arising out of the non-performance of commercial agreements do not end up in court. Either some settlement is worked out by the parties, or one side simply abandons its position, and accedes to the claim of the other. No change in any particular axiom of contract law will

\[177\] See, e.g., Endress v. Friedberg, 24 N.Y.2d 478, 248 N.E.2d 901, 301 N.Y.S.2d 65 (1969) (no wrongful death action for prenatal injuries causing death of unborn infant). Despite the force of Judge Burke's dissent (id. at 489, 248 N.E.2d at 907, 301 N.Y.S.2d at 73) the majority's opinion is persuasive both as to the need to "draw a line" and as to the merits of drawing it where they do.
alter this. Judicial adjustment of contract disputes is the exception rather than the rule, and agreements are kept—to the extent that they are—largely because of extra-legal pressures and sanctions.¹⁷⁸

What can change, however, is the frame of reference within which settlement negotiations are conducted. The threat of litigation is seldom invoked, but the probable outcome of the unwanted lawsuit is one of the factors—perhaps not decisive, but influential—that determines whether or not to settle, and for how much. If the law should frankly tip the scales against bad faith in the context of a contract to bargain, then such conduct might be deterred. Even if the end result of such a development were merely an increase in the settlements made by those desiring to escape from their agreements, to raise the price of bad faith in this manner seems quite in harmony with the spirit of the Code.

Having attempted to answer the principal arguments against judicial recognition of the contract to bargain, there is one more affirmative argument—perhaps implicit from what has been said before, but worthy of restatement here. Recognition of the contract to bargain would have a beneficial effect on “the law” itself—upon the quality of legal decision-making and the decisions it creates. It would represent a movement away from fiction and toward reality in two related but distinct respects.

There is some evidence in the cases discussed above that courts will respond to the element of bad faith when it is clearly present. If the law persists in declaring bad faith irrelevant in the negotiation process, the court which is faced with clear bad faith conduct will be forced either to find a complete contract where in the absence of bad faith no such contract would be found, or else to write an opinion in which bad faith conduct is either condoned or ignored. Neither of these alternatives makes for “good law,” a judicial opinion which, by the moral and logical force of its reasoning, compels acquiescence.

It is also perfectly clear that contracts do not really spring, full-blown, from the collective brows of the parties or their attorneys. It is often difficult to say at what point each party regards himself or the other party as bound. The possible variations are so numerous that the law cannot—and should not—attempt to fashion a different rule for every variety of subjective intention which each party might entertain, if only because such rules would be complex beyond any hope of comprehension, or administration.

Nevertheless, the evidence from cases and our own experience is that parties do often wish to register in an effective way their common commitment to an agreement, while reserving the privilege of differing over points not yet settled. If they have made such an agreement, the law has no business telling them their act of agreement was devoid of legal significance. Nor is the court, in characterizing that agreement, obliged to choose between only two labels, "complete contract" or "mere negotiation," neither of which accurately describes the case. If these were once the only alternatives, they are no longer. Under U.C.C. Section 2-204(3), if the parties intended a contract to bargain, and one of them is found to have breached his duty thereunder, nothing remains for the court but to determine whether an appropriate remedy is available. If there is such a remedy, it should be awarded.

For years, the "contract to make a contract" has been as firmly fixed in the affairs of men as the moon in its track, and yet, because of a seemingly unavoidable logical contradiction, has been as remote from our legal system as the moon seemed to Professor Corbin. The draftsmen of the Code have now bridged this abyss of contradiction; any judge persuaded to cross it will find the step a short one, and the terrain on the far side not as unfamiliar as might have been expected.