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SOME COMMENTS ON UNILATERAL CONTRACTS AND RESTATEMENT 90

WALTER D. NAVIN, JR.*

Since at least the time of *Rogers v. Snow*,¹ the courts have had before them for decision, factual situations in which the promise of one, sought to be enforced, was in some manner coupled with the act of another. "Just as in case I promise a man 20s, if he will go to York for me in an action on the case on this promise he must allege the performance on his own part," said Gawdy, Jun.² Today, the unilateral contract is widely recognized in definitional terms at least,³ and generations of law students have struggled with questions concerning the presence of the necessary mutual assent in the actor,⁴ of notice of acceptance to the promisor⁵ and of the presence or absence of the traditional elements of consideration as they arose out of the unilateral fact patterns.⁶

Conceptually the unilateral idea of contractual liability is given consistency within the framework of the law of contract by phrasing its ingredients in terms of offer and acceptance.⁷ That is, the requisite element of mutual assent is found in the offeror's promise being offered *in exchange* for the act of the promisee.⁸ And the act must be given *in return* with the intent of accepting the offer.⁹ As the courts sometimes more simply put it, the offer is accepted by the requested act.¹⁰

But the justices and scholars, in the process of formulating this admirable and logical analysis as expounded in the monumental *Restatement of Contracts*, had some puzzling questions to ask about the resulting legal relationship of the actor and the promisor. What, for instance, of the offeror's power of revocation? If the act requested required some length of time to perform, could he revoke at any time prior to receiving that which he had requested, the completion of the act?

This interesting conundrum seems to have become articulate in the minds of the legal scholars about the turn of the twentieth century.¹¹ This resulted in a veritable rash of articles, comments and decisions

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¹ In the Kings Bench, 1578, Dalison 94; found at CORBIN'S CASES ON CONTRACTS 26 (3rd Ed. 1953).

² *Ibid.*

³ RESTATEMENT, CONTRACTS §12 (1932).

⁴ Taft v. Hyatt, 105 Kan. 35, 180 Pac. 213 (1919).

⁵ Bishop v. Frank Eaton, 161 Mass. 496, 37 N.E. 665 (1894).

⁶ J. H. Queal & Co. v. Peterson, 138 Iowa 514, 116 N.W. 593 (1908).

⁷ RESTATEMENT, CONTRACTS §§22, 24, 29, 45, 55 (1932).

⁸ *Id.*, §24.

⁹ *Id.*, §55.

¹⁰ Port Huron Machinery Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928).

¹¹ The case of Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902) may have conveniently served as a catalyst in this respect.

concerning the better analytical solution thereof. It has been variously suggested that the actor may cease activity at any time so there is no good reason why the promisor may not revoke at any time prior to the receipt of full performance;¹² that there are really two offers, the original one, and an offer arising by implication of law not to revoke the original, the consideration for which may be found in the beginning of performance;¹³ that what really is involved in the factual situation from a legal standpoint is the application of the doctrine of equitable estoppel.¹⁴ It was also pointed out that by the simple process of construing the conduct of the actor as promissory in nature a bilateral contract would result, the consequences of which would protect each from the possibility of withdrawal on the part of the other.¹⁵ If the offer could be interpreted as calling for a series of separate acts, the performance of each completed a separate unilateral contract, but the remaining series still could be revoked.¹⁶ The offer, clearly unilateral, might also be construed as calling for acceptance upon completion of the first act, the other following acts being conditions to the offeror's duty of performance.¹⁷ All this suggested a new name for the situation to one writer: a uni-promissory contract.¹⁸

Most of these solutions appear in one form or another in the *Restatement's* analysis of mutual assent.¹⁹ More particularly, the theory of the irrevocable offer combined with the conditional duty appears in *Restatement* 45, which reads:

If an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree, in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer. . . .

The doctrine of estoppel—called promissory estoppel by many—appears in *Restatement* 90 and reads:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial char-

¹² Wormser, *The True Conception of Unilateral Contract*, 26 *Yale L. J.* 136 (1916), in *SELECTED READINGS ON THE LAW OF CONTRACTS*, 307 (1931) [hereafter cited, *SELECTED READINGS*].

¹³ McGovney, *Irrevocable Offers*, 27 *HARV. L. REV.* 654 (1914); *SELECTED READINGS*, 300.

¹⁴ Ashley, *Offers Calling for a Consideration Other than a Counter Promise*, 23 *HARV. L. REV.* 159 (1910); *SELECTED READINGS*, 293.

¹⁵ *American Publishing Co. v. Walker*, 87 *Mo. App.* 503 (1901); *Davis v. Jacoby*, 1 *Cal. 2d* 370, 34 *P. 2d* 1026 (1934).

¹⁶ *Hopkins v. Racine Iron Co.*, 137 *Wis.* 538, 119 *N.W.* 301 (1909).

¹⁷ *Brackenbury v. Hodgkin*, 116 *Me.* 399, 102 *A.* 106 (1917); Corbin, *The Formation of a Unilateral Contract*, 27 *YALE L. J.* 382 (1918); *SELECTED READINGS*, 316. And, generally, see *SIMPSON, CONTRACTS*, 21, (1954).

¹⁸ Ballantine, *Acceptance of Offers for Unilateral Contracts By Partial Performance of Service Requested*, 5 *MINN. L. REV.* 94 (1921); *SELECTED READINGS*, 312.

¹⁹ *RESTATEMENT, CONTRACTS* §§31, 44, 45 (1932).

acter on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by the enforcement of the promise.

It should be observed that whereas the statement encompassed by *Restatement 45* found its way into the *Restatement* in topic 2, "Manifestation of Assent," the estoppel doctrine found itself under topic 4, "Informal Contracts Without Assent or Consideration." There is a reference in the comments following *Restatement 45*, pointing out that some offers may become irrevocable by acts in justifiable reliance on the promise.²⁰

It is at this point then, that the internal consistency of the working rules of the law of the formation of informal contracts intertwines two conceptual ideas, mutual assent and the requirement of consideration.²¹ Indeed the factual situation itself inextricably intertwines them, particularly if by contractual is meant the traditional bargain view of consideration: Theoretically, the act of performance expresses both the willingness to be bound and also gives the promisor his consideration.

If bargained for, the role of the act in the rule enunciated by *Restatement 45* is clear. Mr. Justice Holmes' famous question as to whether the offer induced the act and the act the offer is answered;²² yet the question of bargain seems basically irrelevant to the role of the act when considering the role expressed in *Restatement 90*. If the act is bargained for, the theory of *Restatement 45* may bind the offeror; whether the act was bargained for or not, if the safeguards²³ of *Restatement 90* are met, the offeror is bound. It is at this point, usually, when these legal materials and their substance have been partially assimilated by the freshmen student of Contracts, that an exasperated frown creases his face, his hands waves determinedly before his instructor's desk, and he asks: "Professor, just exactly what is the nature of the relationship between the unilateral offer, bargain and the promise enforced by reliance?" What, indeed!

From what this writer suspects, many instructors reply²⁴ to the general effect that if the act was in fact bargained for, technical consideration in the true sense will be present, at least when completion

²⁰ *Id.* §45, Comment b.

²¹ This reminded us of a remark attributed to Thomas Reed Powell that if you can think of a thing that is inextricably attached to something else without thinking of that thing, then you have a legal mind! (Reported by William H. Edwards of the Providence, R.I., bar in a book review at 49 A.B.A.J. 852 (1962).)

²² *Wisconsin & Michigan R.R. Co. v. Powers*, 191 U.S. 379, 386 (1903).

²³ By safeguards we mean the limitations on enforceability built into RESTATEMENT §90. They are (1.) Did the promisor reasonably expect his promise to induce action or forbearance. (2.) of a definite and substantial character on the part of the promisee? (3.) Did it induce such action or forbearance? (4.) Can justice be avoided only by enforcement? See RESTATEMENT, CONTRACTS §90. (1932).

²⁴ The author and one other of his own personal knowledge.

occurs, mutual assent is obviously manifested and the logic of *Restatement* 45 applies. If the action were not in fact bargained for (doesn't meet the standard tests of consideration?) then promissory estoppel as encapsulated in *Restatement* 90 may come into play.²⁵

This is a rather bony reply for a question deserving of a more substantial repast. It occurred to the author that a review of some of the case decisions since the wide promulgation of the *Restatement* might provide some additional protein for the skeleton sketched above. It will be our purpose, therefore, to examine many (not all by any means) of the reported decisions of the last three decades (and others where appropriate, naturally) which have consciously invoked either *Restatement* 45 or 90 in fact situations which are thought to be, in a traditional sense, unilateral in their aspect. We cannot help but repeat here, however, the words of a professor writing on very nearly the same subject in the year 1910:

The present writer must admit in advance that he cannot suggest any theory which meets to his own satisfaction all cases, or which strikes him as unquestionably sound, even as to situations to which it might apply. Perhaps, however, a review of some of the decisions may lead to suggestive thought on the part of some reader.²⁶

There are two preliminary matters which may best be set to one side at this juncture. Occasionally the phrase "unilateral contract" will be used to describe a factual situation in which one party has made a promise but the other party has done nothing, has not placed himself in a position where it can be said that he gave consideration for the promise. This is, of course, acceptable provided one understands that the situation being pictured thus represents the idea of a promise which is not enforceable because consideration on one side has not been forthcoming. Many have failed to see the distinction between a promise without consideration and a promise for which consideration has been executed, either by performance of a requested promise or an act. Both must be bound or neither is bound, say the cases.²⁷ A 1922 Kansas case asserts that "a unilateral contract is exactly as impossible as any other one-sided thing of two sides."²⁸ For our present undertaking, it must be remembered that one may be bound contractually speaking to perform a promise when the other contracting party is under no duty to perform at all.²⁹ The *Restatement* definition is convenient—a unilateral contract is one in which no promisor received a promise as considera-

²⁵ Compare 1 CORBIN, CONTRACTS §62 with §206 (1951).

²⁶ Ashley, *supra* note 14.

²⁷ They are collected at 1 CORBIN, CONTRACTS §21 (1951).

²⁸ Rallsback v. Raines, 110 Kan. 220, 203 Pac. 687 (1922).

²⁹ The typical paid-for option contract is a good example.

tion—and by implication the unilateral offer is one which requests no promise as part of the sought for return.³⁰

The second item is the theory denominated by some as the Promissory Act. In making an offer it is both theoretically and actually possible that in requesting an act in exchange, the act itself may represent the giving of a return promise. Thus where homeowners signed a purchase order for certain specified roofing work which contained language indicating that the roofer could accept the order by commencing work, it was held that the act of loading two trucks and driving to the home was an operative acceptance.³¹ Note that the act of beginning work may easily be taken as conduct evidencing the roofers' intent to be bound to the promises contained in the order. Since any return promise is itself an act—the act of speaking or writing—the theory of promissory acts has much to recommend it as an analytical tool for the lawyer in attacking many of these factual situations in which it does not readily appear that the act itself is the essential ingredient in the bargained for exchange.³² But the courts seem reluctant to approach the problems on any such basis. Few decisions speak of promissory acts. We shall for purposes of the paper not hereafter consider the promissory act as such.

RESTATEMENT 45 CASES

We now turn to consideration of several judicial decisions in which the courts have consciously applied the theory of unilateral contract thereby rendering a promise enforceable or not on the basis of the action undertaken.

Real estate brokerage contracts make up a sizeable portion of the total number of cases arising in this general category and one wonders what there is about the real estate brokerage fact situation that seems to lead to litigation, especially in view of the fact that the broker nearly always is successful. Both *Restatement 45* and *Restatement 90* have been cited in the decisions, nearly all of which give to the broker his commission where he has obtained an "exclusive listing" and has expended time and effort in trying to find that most elusive individual, the willing buyer.³³ In this fact situation we would suppose that the seller is actually buying the knowledgeable acts of the broker and the courts, in holding the promisor to his duty to pay the commission when acts have taken place (although no willing buyer is waiting anxiously in the front

³⁰ RESTATEMENT, CONTRACTS, §12 (1932).

³¹ *Ever-Tite Roofing Corp. v. Green*, 83 So. 2d 449 (La. App., 1955).

³² *Mott v. Jackson*, 172 Ala. 448, 55 So. 528 (1911); 1 CORBIN, CONTRACTS §62 (1951).

³³ *Bell v. Dimmerling*, 149 Ohio 165, 78 N.E. 2d 49 (1948); *Ruess v. Baron*, 10 P. 2d 518 (1932); *Richter v. First National Bank of Cincinnati*, 82 Ohio App. 41, 80 N.E. 2d 243 (1947). Many brokerage cases are collected in 1 CORBIN, CONTRACTS §50 (1951). *Hutchinson v. Dobson-Bainbridge Realty Co., Inc.*, 31 Tenn. App. 490, 217 S.W. 2d 6 (1946); *McManus v. Newcomb*, 61 A. 2d 36 (D.C. Mun. App., 1948).

seat of the broker's Cadillac), quite possibly are giving recognition to the essence of the deal; there has taken place a traditional bargain exchange. This is not to say that the doctrine of promissory estoppel does not appear in some of the cases, for it does.³⁴ But even in these decisions one feels the implication of bargain—not estoppel. Some brokerage decisions have found by implication a promise in the broker to handle the matter properly, or to work intensively, thus making it a bilateral contract.³⁵

Most law students are familiar with the New York rule of *Petterson v. Pattberg*.³⁶ There an offer to accept a cash payment in settlement of a mortgage debt was revoked by the offeror as the offeree very nearly waved the cash under the nose of the promisor.³⁷ The court justified its holding on the theory of unilateral contract: the offer requested the act of payment and the payment hadn't been made before the offer had been revoked. One commentator has observed that the cooperation of the offeror was needed to complete the act,³⁸ but the *Restatement* appears to disagree.³⁹ The New York legislature attempted to abrogate some of the harshness of the rule;⁴⁰ quite recently a federal district judge sitting in New York cited *Petterson* by name and referred to its harsh doctrine.⁴¹

Not so many students are familiar with *Bretz v. Union Central Life Insurance Co.*,⁴² where the doctrine of the *Petterson* case was carried to extreme limits by the Ohio Supreme Court. Bretz and others owned land against which there were two mortgages of record; in addition to which Bretz himself had some sizeable unsecured debts. Apparently wishing to consolidate his debts and refinance his operations, he worked out an agreement with the Farm Credit Administration which required him to secure the release of the first mortgage held by Union Central Life Insurance Co. in exchange for the lowest negotiated cash payment. Bretz was successful and received in writing a statement of Union that they would release the mortgage if within 90 days Bretz would pay them the sum agreed. A short time later, after acts in reliance by Bretz, but before the expiration of the 90 day period, Union revoked their offer. It seems impossible not to conclude that Union understood the nature of the arrangement Bretz had set up with the Farm Credit Administration, and it also seems impossible not to assume that Union knew that

³⁴ *Richter v. First National Bank of Cincinnati*, *id.*

³⁵ *Hammond v. C.I.T. Financial Corp.*, 203 F. 2d 705 (2d Cir. 1953).

³⁶ 248 N.Y. 86, 161 N.E. 428 (1928).

³⁷ An earlier letter of revocation apparently was barred from the trial; this fact doesn't appear in the opinion. See 14 CORNELL L. Q. 81, n. 18 (1928).

³⁸ SIMPSON, CONTRACTS §21 (1954).

³⁹ RESTATEMENT, CONTRACTS §45, Comment b (1932).

⁴⁰ NEW YORK PERSONAL PROPERTY LAW §33 b.

⁴¹ *P.H.S. Van-Ommereen v. International Bank*, 196 F. Supp. 200 (1961).

⁴² 134 Ohio 102, 134 Ohio 171, 16 N.E. 2d 272 (1938).

in order for Bretz to obtain the money for payment from his lending agency (The Federal Land Bank) he would have to take the steps he did, namely, obtaining a survey, getting abstracts of title brought up to date, and the like. On the other hand, it is clear that the Insurance company was not "given or tendered"⁴³ any part of that which they desired, payment of the cash. If non-bargain is to be woven into the thread of promissory estoppel, here is a case that cries out for its application.⁴⁴ Two lower courts upheld Bretz's request for specific performance. In reversing, the Ohio Supreme Court reasoned that Union had made an offer which requested the act of payment. Since no obligation was placed on Bretz, neither party was bound and both could withdraw. There was no acceptance by Bretz because the steps he took were merely preparatory.

In *Bretz*, the unilateral concept is utilized to deny promissory liability in a factual situation in which the promise given resulted in acts taken by the offeree not of a nature bargained for. In *I and I Holding Corp. v. Gainsburg*,⁴⁵ a charitable subscription case, the unilateral concept is applied to enforce liability and the court finds it necessary to imply a bargain exchange in reaching this result. Gainsburg promised to pay Israel hospital \$5,000 in order that it might continue its humanitarian work. After contradictory lower court decisions, the New York Court of Appeals held that since Gainsburg, by implication, requested the charity to continue its work, there was a bargained for unilateral contract. Judge Lehman dissented. It was his view that the hospital simply kept right on doing what it had been doing and had expected to keep right on doing it. Promissory estoppel applies only when there was performed some act by the recipient that he was not otherwise obligated to perform. Lehman placed a great deal of emphasis on the unilateral concept of the transaction and apparently felt that even in the promissory estoppel cases one looks to bargain for enforcement.

Two contractor's bid cases, *R. J. Daum Construction Co. v. Child*⁴⁶ and *Drennan v. Star Paving Co.*,⁴⁷ may be used to illustrate the dichotomy between bargain and non-bargain and also the relation of the acts undertaken to the concept of mutual assent. The basic facts in these bid cases are similar. A sub-contractor submits a bid to a general contractor for a portion of the work on which the general contractor then submits his bid, using the sub-contractor's figures. The general contractor is successful and the sub-contractor wishes to withdraw before his bid is

⁴³ Note that RESTATEMENT, CONTRACTS, §45 (1932) probably does not apply to the fact situation. But see *Abbott v. Stephany Poultry Co.*, 44 Del. 513, 62 A. 2d 243 (1948).

⁴⁴ See *First Trust Co. of Omaha v. Glendale Realty Co.*, 125 Neb. 283, 250 N.W. 68 (1933).

⁴⁵ 276 N.Y. 427, 12 N.E. 2d 532 (1938).

⁴⁶ 122 Utah 194, 247 P. 2d 817 (1942).

⁴⁷ 51 Cal. 2d 409, 333 P. 2d 757 (1958).

accepted. In *Daum* the sub-contractor was successful; in *Drennan*, he was not. In *Daum* the Utah court reasoned that since the general contractor, after he had been notified that his bid was successful, sent the sub-contractor a written contract, no acceptance had occurred, the returned contract being a counter-offer. There cannot be promissory liability where there is no acceptance. Therefore, there was no reason to apply the doctrine of promissory estoppel. In *Drennan* there was no return written contract, but apparently the sub-contractor was successful in communicating his desire not to be bound to the quoted figure before the bidder had accepted them. Yet, the sub-contractor was held to his promise by an application of the rule expressed in *Restatement 90*. The analogous problem of the revocability of an offer for a unilateral contract, said the California court, has been solved by *Restatement 45*, and such an offer is no longer revocable at any time before complete performance. But isn't the insistence in *Daum* on the necessity of acceptance, a search for a bargain? This requirement of mutual assent in the bargain transaction also excluded the application of *Restatement 90* to a promise which resulted in acts not bargained for in *James Baird Co. v. Gimbel Bros.*⁴⁸

Hollidge v. Gussow, Kahn and Co.,⁴⁹ is a decision illustrating the factual situation in which a promisor may receive part of the actual consideration for which he bargained. Hollidge ordered 160,000 copies of an advertising newspaper, divided into eight issues, and he promised to pay therefor \$940 per issue. Hollidge became bankrupt after the delivery of the first issue and the printers were successful in arguing that their delivery of the first issue was such part performance as made the promise to pay binding under *Restatement 45*. They could reclaim lost profit on the seven issues not delivered from the bankrupt's estate. Ignoring the possibility that there was a return promise from the printer, thus giving rise to a bilateral contract, this would seem to be an accurate application of the black letter law of *Restatement 45*. The delivery of the first issue is clearly not merely preparatory in nature but, on the contrary, is an essential part of the exchange sought.

Considering the relatively few *Restatement 45* cases with the formidable number of decisions recently utilizing *Restatement 90*, the thought may strike one that *Restatement 45* is really quite limited in its usefulness. If recognized as being concerned only with those fact situations in which the promisor has actually received a part of that which he requested, under circumstances showing the actor's knowledge of the offer,⁵⁰ it may have some utility in excluding preparatory acts as grounds for recovery, but this is as much a disadvantage to concepts of

⁴⁸ 64 F. 2d 344 (2d Cir. 1933).

⁴⁹ 67 F. 2d 459 (1st Cir. 1933).

⁵⁰ See RESTATEMENT, CONTRACTS §353 (1932).

justice as an advantage to the framework of offer and acceptance and consideration, as witness the *Bretz* case.

The hunch that there are really few if any fact situations in which one cannot reasonably infer a return promise, first expressed by Wormser⁵¹ and buttressed by those decisions in which the alternatives of a bilateral or unilateral contract are both given as rationales for the results,⁵² that hunch persists. It may well be that the internal consistency of the law of offer and acceptance and of consideration may be better served by greater emphasis on the application of the rationale in *Restatement* 31, leaving to the words "unilateral contract" that meaning referred to earlier, executed consideration on one side of the exchange, the other party remaining bound.

THE RESTATEMENT 90 CASES

The amazing number, range of factual situations and rationales given by the judges in the *Restatement* 90 cases during the past three decades challenge the abilities of the best legal scholars, to generalize successfully from the decisions.⁵³ It is not our purpose here to attempt such an undertaking but rather to examine those decisions which treat of the bargain principle within the context of enforcing a promise which has intertwined itself with an act.

The promises made have involved as wide a range of human activity as could be imagined. An attorney promised another litigant a pro-rata share of his trial expenses,⁵⁴ a landlord promised to extend a lease, then died,⁵⁵ widows continue to sign promissory notes representing the debts of their deceased husbands,⁵⁶ a brother promised his sister a share of profits and no losses and used her name in establishing a brokerage account,⁵⁷ a seller of airplanes promised to maintain insurance on one that crashed a short time later,⁵⁸ a bank employee for forty years is promised a bonus,⁵⁹ another bank's vice-president promised a local merchant that a certain check would be honored,⁶⁰ a pledgee promised a pledgor that she could redeem her mink coat although the redemption period was past,⁶¹ a doctor promised his good friend, a lawyer, that he

⁵¹ Wormser, *supra*, note 12.

⁵² *Campbell v. Jones & Laughlin Steel Corp.*, 96 F. Supp. 189 (W.D. Pa. 1951); *Petroleum Research Corp. v. Barnsdall R. Corp.*, 188 Okla. 62, 105 P. 2d 1047 (1940).

⁵³ For an excellent correlation of the legal decisions giving rise to the generalization stated in RESTATEMENT 90, see Boyer, *Promissory Estoppel: Principle From Precedents*, 50 MICH. L. REV. 639 and 873 (1952).

⁵⁴ *Schafer v. Fraser*, 206 Ore. 446, 290 P. 2d 190 (1955).

⁵⁵ *Bard v. Kent*, 19 Cal. 2d 449, 122 P. 2d 8 (1942).

⁵⁶ *McCowan v. McCord*, 49 Ga. App. 358, 175 S.E. 593 (1934).

⁵⁷ *In re Jamison's Estate*, 202 S.W. 2d 879 (Mo., 1947).

⁵⁸ *Northern Commercial Co. v. United Automotive*, 101 F. Supp. 169 (D.C. 3d Div. Alaska 1951).

⁵⁹ *Hunter v. Sparling*, 87 Cal. App. 2d 711, 197 P. 2d 807 (1948).

⁶⁰ *Rio Motor Car Co. v. Western Bank & Trust Co.*, 48 Ohio App. 387, 194 N.E. 392 (1934).

⁶¹ *Wade v. Markwell & Co.*, 118 Cal. App. 2d 410, 258 P. 2d 497 (1953).

would never obstruct the view from his friend's proposed home,⁶² a company official promised strike breakers permanent jobs but when the strike ended promptly fired them,⁶³ and, naturally, oral promises conveying freehold estates in land⁶⁴ and promises to charitable institutions were still being made by unsuspecting laymen.⁶⁵

The list is by no means exhaustive but the only conscious common thread is the court's overt recognition that the problem involved the question of bargain. Other than that, any search for a binding thread of legal usefulness is not easy to come by. Recovery was *denied* the strike breakers,⁶⁶ the lessee,⁶⁷ the holder of the widow's note,⁶⁸ the buyer of the airplane,⁶⁹ the holder of the check,⁷⁰ and at least one recipient of an oral promise of real estate.⁷¹ Charitable subscriptions continue to be turned down also.⁷²

Consider *Bard v. Kent*.⁷³ The lessee secured a written offer from his landlord promising to extend his lease if his sub-lessee would make improvements thereon totalling \$10,000, as established by an architect. The written offer contained a recital that \$10.00 had been paid for the promise, but all admitted that the \$10.00 had in fact not been paid. Having obtained this document, the lessee hired an architect and expended fees therefor. The landowner died before the lessee exercised what he thought was his option and the decedent's administrator argued, successfully, that the option was without consideration and therefore revocable by death. The lessee asserted that if any consideration for the offer was necessary to make it irrevocable, it could be found in his acts in hiring the architect and paying his fees, in his reliance on the promise. But Judge Traynor of the California Supreme Court felt otherwise. Those fees could have been consideration if bargained for, but no act of an offeree could constitute such unless the offeror agreed to accept such an act as the return for her promise.⁷⁴

The case of the widow's promissory note also applies the bargained-for theory of consideration, in the face of *Restatement* 90 arguments, in denying liability on the note. A creditor of the estate, receiving the widow's note, withdrew his claim. The Georgia court then refused to

⁶² *Miller v. Lawlor*, 245 Iowa 1144, 66 N.W. 2d 267 (1954).

⁶³ *Bixby et al v. Wilson & Co.*, 196 F. Supp. 889 (1961).

⁶⁴ *LaFlamme v. Hoffman*, 148 Me. 444, 95 A. 2d 802 (1953).

⁶⁵ *J. and J. Holding Corp. v. Gainsburg*, *supra* note 45; *Floyd v. Christian Church Widows and Orphans Home*, 296 Ky. 196, 176 S.W. 2d 125 (1943); *American U. v. Todd*, 39 Del. 449, 1 A. 2d 595 (1938).

⁶⁶ *Bixby et al v. Wilson & Co.*, *supra* note 63.

⁶⁷ *Bard v. Kent*, *supra* note 55.

⁶⁸ *McCowen v. McCord*, *supra* note 56.

⁶⁹ *Northern Commercial Co. v. United Automotive*, *supra* note 58.

⁷⁰ *Reo Motor Car Co. v. Western Bank & Trust Co.*, *supra* note 60.

⁷¹ *LaFlamme v. Hoffman*, *supra* note 64.

⁷² *Floyd v. Christian Church Widows and Orphans Home*, *supra* note 65.

⁷³ *Bard v. Kent*, *supra* note 55.

⁷⁴ 122 P. 2d at page 10.

enforce the widow's promise to pay; there was no understanding or agreement that the creditor would withdraw his claim in exchange for the note.⁷⁵

In *LaFlamme v. Hoffman*⁷⁶ a written transfer of a life estate in land caused the defendant to move his family from an apartment to the land and erect thereon valuable improvements. When the landowner sought to recover possession, the written promissory transfer was not enforced by the Maine Supreme Court and a referee in the lower court who thought otherwise was properly chastised. The rule that a promise is not binding without consideration needs no citation of authority and acts performed in reliance upon the promise cannot constitute a consideration, therefore, unless the performance of the acts is at the request of the promisor. Nothing is consideration that is not bargained for; it must have induced the promise. In so holding, the Maine court rejected specifically and by name the doctrine of promissory estoppel. A treatise editor in his most recent pocket part refers to this case as being clearly erroneous and out of line with authority.⁷⁷ No reference is there made to the role of the seal in Maine jurisprudence which as a doctrine apparently continues in all its common law vigor.⁷⁸ This would make a gift promise enforceable simply by the formality of the seal, removing most, if not all, of the underlying necessity of *Restatement* 90. If there exists a simple, formal manner in which a promise without consideration is binding, why bother with the ornate meanderings of the doctrine of promissory estoppel? But while the seal may effectively dispose of *LaFlamme v. Hoffman*, the rationale that the act must be requested, as set forth in *LaFlamme* found vigorous use in *U.S. Trust Co. v. Frelinghuysen*,⁷⁹ an intermediate New York appellate court decision. The case was reversed on appeal, but the opinion is worth study if only for the court's attempt to limit *Restatement* 90 to gift promises and charitable subscriptions.

And the strike breakers' case certainly has no easy solution as did the mystery of *LaFlamme*. The Wilson & Co. meat packing plant in Cedar Rapids, Iowa, found itself with a serious strike on its hands and, deciding to remain open, it began to recruit workers from the surrounding small towns in eastern Iowa. After commencing work, company officials continued to assure them of positions and they were promised permanent employment at the plant. Many of the workers then sold their homes and their small farms and moved to Cedar Rapids. As a result

⁷⁵ *McCowen v. McCord*, *supra* note 56.

⁷⁶ *LaFlamme v. Hoffman*, *supra* note 64.

⁷⁷ 1 CORBIN, CONTRACTS §194, (Supp. 1962).

⁷⁸ *Augusta Bank v. Hamblet*, 35 Me. 491 (1853).

⁷⁹ 28 N.Y.S. 2d 448 (C.A. 1941); *revd. on other grounds*, 288 N.Y. 365, 43 N.E. 2d 492 (1942). The "other grounds" was the presence of a seal on the instrument in question which was given common law effect as a substitute for consideration.

of an arbitration decision following the settlement of the strike, union employees (the strikers) were given seniority and the company fired the strike breakers. Those promised permanent jobs brought suit against the meat packer in the federal district court in northern Iowa. Despite the fact that *Miller v. Lawlor*⁸⁰ had less than ten years earlier been decided by the state supreme court, the district court judge ruled against the strike breakers. Part of the problem of the case, of course, is the presence of the "permanent employment" verbalization. Ordinarily courts are reluctant to bind employers to such promises and without some additional consideration (other than the work of the employee) such contracts are said to be terminable at will.⁸¹ With additional executed consideration, however, the promise becomes binding on the employer, just as any other unilateral contract.⁸² After a careful review of the many decisions in both the permanent employment area and promissory estoppel, Judge Graven came to the conclusion that the change in position in reliance upon the promise was not such consideration as would support the permanent employment contract. The intriguing aspect of the decision is that the result is placed squarely upon the last test of *Restatement* 90, enforcement of the promise in this fact situation would be unjust.⁸³

Just as *Restatement* 90 had been utilized unsuccessfully to avoid the rule of terminable at will employment contracts it has also been used, with varying degrees of success, to offset the application of Statute of Frauds,⁸⁴ statutes of limitation,⁸⁵ and the parole evidence rule.⁸⁶ In *Reo Motor Car Co., v. Western Bank and Trust Co.*,⁸⁷ Reo, knowing that an embezzler had just absconded with the funds of a car dealer with which it did business, became quite concerned about a check it held of that dealer's. Reo called the bank upon which the check was drawn and talked to a vice-president, explaining in detail the situation. The vice-president reassured Reo, told him there were adequate funds in the bank to cover the check and promised him that the check would be honored by his bank. The receiver appointed for the insolvent dealer reached the funds before the check, and Reo sued the bank on its oral promise to honor the check, urging that *Restatement* 90 could avoid the statutory requirement that acceptance of checks must be in writing.⁸⁸ Reo lost, the

⁸⁰ *Miller v. Lawlor*, *supra* note 62.

⁸¹ See 1 CORBIN, CONTRACTS §96 (1951).

⁸² *Id.* especially note 23 therein.

⁸³ *Supra*, note 23.

⁸⁴ *Ravarino v. Price*, 123 Utah 559, 260 P. 2d 570 (1953); *Mann v. McDermott*, 43 A. 2d 815 (R.I., 1950); *Kelley v. Graham*, 73 S.D. 11, 38 N.W. 2d 460 (1949).

⁸⁵ *Beregon v. Mausour*, 152 F. 2d 27 (1st 1945); *Maugh v. Leonard*, 69 Ariz. 214, 211 P. 2d 806 (1949); *Swift v. Peterson*, 240 Iowa 715, 37 N.W. 2d 258 (1949); *Pullmarrlo v. Ray*, 201 Md. 268, 94 A. 2d 266 (C.A. 1953).

⁸⁶ *Lush-Harbiton-Jones, Inc. v. Universal Credit Corp.*, 164 Miss. 693, 145 So. 623 (1933).

⁸⁷ *Reo Motor Car Co. v. Western Bank & Trust Co.*, *supra* note 60.

⁸⁸ UNIFORM NEGOTIABLE INSTRUMENTS LAW §132.

Ohio appellate court feeling that the requirements of certainty in negotiable instruments must take precedence over any doctrine as malleable as promissory estoppel.

Many times the decision makers, troubled by the ambiguities of doctrine, keep two strings on their bow. The result will be justified on two alternative grounds, one bargain, the other non-bargain. As examples one can cite *Martin v. Dixie Planing Mill*,⁸⁹ (consideration present in new benefit to defendant and *Restatement 90* also applies); *Ellis v. Wadleigh*,⁹⁰ (services bargained for, *Restatement 90* applies); *Hunter v. Sparling*,⁹¹ (unilateral offer accepted by performance of a gift promise made binding by *Restatement 90*); *Langer v. Superior Steel Corporation*,⁹² (condition to gift promise interpreted as consideration, *Restatement 90* also applies); *I & I Holding Corp. v. Gainsburg*,⁹³ (charitable subscription enforced as unilateral contract, *Restatement 90* also applies). On the other hand, there are strong decisions ignoring either expressly or by implication the traditional bargained for theory in these fact situations. The most notable of these is *Schafer v. Fraser*,⁹⁴ where the Oregon Supreme Court, recognizing the presence of consideration in the traditional pattern in the facts, set it to one side and based its holding entirely on a general application of *Restatement 90*. It said:

. . . [W]e do not think that is anything peculiar to this line of cases (*Restatement 90* applications) or that they impel the conclusion that the doctrine is anomalous and should be held in close leash. Some courts, as is evident from the above review . . . apparently approve the doctrine for general application. Historically, action in reliance was the basis for enforcing informal promises in assumpsit. Therefor we believe that the doctrine of reliance whereby an unrecompensed promise can be rendered enforceable, is one general application; provided, of course, that the individual case is brought fully within the rigors of the doctrine.⁹⁵

Some decisions have attempted to limit the doctrine of promissory estoppel to those situations in which the promise relates to an abandonment of existing right.⁹⁶ Others speak of fraud and the elements of estoppel as being requirements.⁹⁷ Many opinions involve the intricate reasoning of *Strong v. Sheffield*⁹⁸ and the problem of the non-

⁸⁹ 199 Miss. 445, 24 So. 2d 332 (1946).

⁹⁰ 27 Wash. 2d 941, 182 P. 2d 49 (1947).

⁹¹ *Hunter v. Sparling*, *supra* note 59.

⁹² 105 Pa. Super. 579, 161 Atl. 571 (1932).

⁹³ 276 N.Y. 427, 12 N.E. 2d 532 (1938).

⁹⁴ 206 Ore. 446, 290 P. 2d 190 (1955); See *Fluckey v. Anderson*, 132 Neb. 664, 273 N.W. 41 (1937).

⁹⁵ 290 P. 2d 190 at page 199.

⁹⁶ *Fiers v. Jacobson*, 123 Mont. 242, 211 P. 2d 968 (1949). *Fried V. Fisher*, 328 Pa. 497, 196 Atl. 39 (1938).

⁹⁷ *Swift v. Peterson*, *supra* note 85; *Charles E. Quincy & Co. v. Cities Service Co.*, 282 N.Y.S. 2d 294 (Sup. Ct. 1935).

⁹⁸ 144 N.Y. 392, 39 N.E. 330 (1895).

act of forbearance as consideration, citing *Restatement* 90 many times for authority.⁹⁹ Some think the decision to make certain promises binding in the absence of consideration or seal is one for the legislature.¹⁰⁰ One closely reasoned decision of the Utah Supreme Court expressed the view that promissory estoppel should be applied only when the promise was deliberately made for the purpose of influencing the conduct of the other party.¹⁰¹

CONCLUSION

This article began as a discursive attempt to outline the boundaries of a relationship existing in the law of contracts; the relationship existing between the concept of the unilateral offer which becomes irrevocable upon substantial part performance of the act requested, and the promise made binding by an act which has brought into play the doctrine of promissory estoppel as stated in *Restatement* 90. Perhaps no conclusion is needed; one probably never concludes any study of a relationship, implying as the word does, a continuing interplay of thought rather than a fixed thing. We do have one suggestion to make at this time and it is a simple one: Whenever a court can reasonably find the presence of ordinary bargain in the fact situation, as evidenced by the traditional tests of consideration, it should be extremely cautious about extending the cloak of *Restatement* 90 to cover its result. The corollary of this suggestion is that *Restatement* 90 should be applied to those fact situations where non-bargain factors clearly predominate.

Contract has always encompassed more than bargain alone, yet the idea of a bargained for exchange as an essential of promissory liability is too deeply imbedded in our law of contract to be suddenly dismissed as a new, relatively untried concept of promissory liability appears in the decisions. (I would, at this time, disagree with those who would assert that the doctrine of promissory estoppel is as old as and has been as thoroughly time tested as the doctrines of bargained for consideration.) The effective use of precedents as predictability factors is not made any simpler by the use of *Restatement* 90 as a device to obliterate consideration, as some of the decisions seem to imply.¹⁰² *Restatement* 90 should be limited to enforcing promises resulting in acts not bargained for, within the limits of the doctrine,¹⁰³ while the theories of *Restatement* 45, 75 and 31 should be given full opportunity to flower in those fact situations where the promise is intertwined with an act as a bargained-for exchange.

⁹⁹ *Pullman Co. v. Ray*, *supra* note 85; *Harvey v. J. P. Morgan & Co.*, 2 N.Y.S. 2d 520 (N.Y. Mun. Ct., 4th dist. 1937); *Carter v. Burns*, 332 Mo. 1128, 61 S.W. 2d 933 (1933); *U.S. Trust Co. v. Frelingburgsen*, *supra* note 79.

¹⁰⁰ *Hill v. Corbett*, 33 Wash. 2d 219, 204 P. 2d 845 (1949); *J. & J. Holding Corp. v. Gainsburg*, 296 N.Y.S. 752 (Sup. Ct. Appl. Div. 1937) (dissenting opinion.)

¹⁰¹ *Ravarino v. Price*, *supra* note 84.

¹⁰² *Schafer v. Fraser*, *supra* note 54, is a good example.

¹⁰³ By limits is meant those tests described *supra* note 23.