number of these agreements, could become insolvent in a very short time, as the purchasers would enforce their contracts almost simultaneously if the securities market became seriously affected by adverse business conditions.

The only justification for repurchase agreements is that they may aid the bank in making advantageous sales, like the "money back guarantee" or "thirty day free trial" special inducements to buy.[11] If agreements to repurchase were limited to a reasonably short term they might not be objectionable,[12] but a person cannot "try out" a mortgage bond. If the agreement is to be of value to him he must have the privilege of exercising his option whenever he sees the market price for his securities falling, usually during a business depression which is the worst possible time for a bank to invest in securities at a loss.

Any analogy between repurchase agreements and guaranteeing indorsements in the sale of bills and notes[13] is incomplete, as is pointed out in the instant opinion, because endorsements on negotiable instruments have become common business practice, like selling real estate by deed of general warranty, and are necessary to make ordinary sales, whereas repurchase agreements are used only as added inducements in exceptional cases. Furthermore, under an endorsement, liability arises only upon default by the debtor and is primarily a function of his financial stability, which the bank has passed upon before making the guaranties; but in agreements to repurchase, the loss suffered by the bank depends not so directly upon the solvency of the debtor as upon general market conditions and the determination of the purchaser to exercise his option.

Contracts—Agreements Preliminary to a More Formal Writing—[Washington].—The defendant had made previous contracts to sell strawberries to the plaintiff through the defendant's broker, which had always culminated in written formal agreements. After negotiations, the defendant made an offer to sell, which was accepted orally by the plaintiff, whereupon the broker mailed a sales memorandum to both parties referring to a preceding year's contract for minor details, which specified "This memo becomes void when sale is covered by contract." A formal contract, "not to be binding until signed by both parties," containing only those terms specified or referred to in the sales memorandum, was drawn up by the defendant and mailed to the plaintiff. This formal contract was never executed, the defendant repudiating the contract before the signature of either party was attached thereto. The court *held*, that the sales memorandum was not a contract since both parties contemplated a formal agreement. *Pacific Food Products Co. v. Mukai.*[1]

[11] *Cf.* Went v. Duluth Coffee and Spice Co., 64 Minn. 307, 67 N.W. 70 (1896) (agreement by a corporation to repurchase its own stock at purchaser's option held "merely a conditional sale with option to revoke or rescind in the purchaser," so that it did not amount to an agreement by the corporation to purchase its own stock within the statute controlling such purchases); Ophir Consol. Mines Co. v. Brynteson, 143 Fed. 829 (C.C.A. 7th 1906) (agreement by a corporation to repurchase shares of its own stock if the buyer was not satisfied held valid as a "sale or return" contract).

[12] But see People *ex rel.* Barrett v. First State Bank and Trust Co., 364 Ill. 294, 4 N.E. (2d) 385 (1936) for a holding that setting a definite time limit would not make a repurchase agreement enforceable.

[13] See Farmer's State Bank v. Couture, 45 N.D. 401, 178 N.W. 138 (1920).

[1] 84 P. (2d) 131 (Wash. 1938).

This problem of the binding effect of an agreement, either oral or written, preliminary to a more formal writing has been a source of a good deal of litigation in the courts, with very little resulting agreement as to a rule to be applied in similar situations. Where all the substantial terms of a contract have been definitely agreed upon, and there is nothing left for a future settlement, the fact alone that it was the understanding of the parties that the contract should be reduced to writing and formally executed should not leave the transaction incomplete and without binding force.[2] This is true since there is no requirement of any positive intention to create a legal obligation at any particular time, as an element of contract.[3] Parties rarely designate any particular moment as that time when they conceive of themselves as bound. The law attaches legal obligations whenever their acts fulfill the requirements of the law.

Certain circumstances will however prevent the preliminary agreement from binding the parties. Where, from the language of the preliminary agreement and from the surrounding circumstances, it can be seen that all the matters to be provided for in the formal writing have not yet been agreed upon, it should be clear that there has been no agreement which the law will regard as a contract, but merely preliminary negotiations looking toward a completed contract to be embodied in the writing. The great majority of cases which seem to hold that preliminary negotiation, such as in the instant case, are not binding, are explainable on the basis of a lack of complete agreement between the parties.[4] This circumstance has not prevented enforcement in cases where the final written instrument was to be of a well-settled or usual form, as in preliminary contracts of insurance, where an enforceable contract is said to exist though many of the details as finally expressed in the written policy are not specified; it being presumed that the parties contemplate the form of policy usual in such cases.[5] Even in an ordinary sales contract, where the final writing was not to be a formalized one, the court itself has filled in certain details as to place of delivery, and the market to be taken in estimating damages in case of breach, in order to enforce the preliminary agreement, despite a failure to execute a formal contract.[6]

On the other hand, if either of the parties has signified an intention not to be bound until the execution of the final writing, this intention will be respected by the law, as would any other portion of the agreement.[7] When there is an express stipulation in

[2] Geary v. Great Atlantic & Pacific Tea Co., 366 Ill. 625, 10 N.E. (2d) 350 (1937); Briggs & Turvias v. United States, 83 Ct. Cl. 664 (1936), *cert. denied* 302 U.S. 690 (1938); Hall v. Hall, 125 Ill. 95, 16 N.E. 896 (1888); Baltimore & Ohio S.W. Ry. Co. v. Brubaker, 217 Ill. 462, 75 N.E. 523 (1905); Garfielde v. United States, 93 U.S. 242 (1876); United States v. Purcell Envelope Co., 249 U.S. 313 (1919); American Smelting & Refining Co. v. United States, 259 U.S. 75 (1922); 1 Williston, Contracts § 28 (rev. ed. 1936); Rest., Contracts § 26 (1932). *Cf.* Nolan v. O'Sullivan, 148 Ill. App. 316 (1909).

[3] 1 Williston, *op. cit. supra* note 2, at § 21; Rest., *op. cit. supra* note 2, at § 20.

[4] W. T. Grant Co. v. Jaeger, 224 Ill. App. 538 (1922); Dreiske v. J. N. Eisendrath Co., 214 Ill. 199, 73 N.E. 379 (1905); Baltimore & Ohio S.W. Ry. Co. v. People, 195 Ill. 423, 63 N.E. 262 (1902); National Union Bldg. Ass'n v. Knab, 177 Ill. App. 649 (1913); El Reno Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642 (1920); Falls v. Visser, 250 Ill. App. 481 (1928); Walsh v. Fallis, 266 Ill. App. 341 (1932).

[5] Cottingham v. Nat'l Church Ins. Co., 290 Ill. 26, 124 N.E. 822 (1919); Welch v. Northern Assurance Co., 223 Ill. App. 77 (1921).

[6] Staackman, Horschitz & Co. v. Cary, 197 Ill. App. 601 (1916).

[7] Baltimore & Ohio S.W. Ry. Co. v. People, 195 Ill. 423, 63 N.E. 262 (1902); Lefler v. Board of School Inspectors, 241 Ill. App. 229 (1926).

the offer prescribing the mode of acceptance, as in life insurance contracts where the application for insurance stipulates that the policy is not to be in force until it has been signed by the officers of the insurance company, no contract is created unless the acceptance is made in the manner prescribed.[8] The difficult problem of determining the parties' intention occurs in cases where there has been what would normally be termed an offer and an acceptance, except for the signification of a need for writing. The task here is to determine whether the parties looked upon the final writing as merely evidence of their preliminary agreement, in which case the preliminary agreement is binding despite a failure to execute the final writing, or as an operative fact without which they would not be bound.[9] A statement in the preliminary negotiations that the parties do not intend to be bound until the final writing is, of course, the clearest way of *leaving* the preliminary negotiations without binding force; but the mere fact that a written draft has been referred to or is contemplated is not sufficient in itself.[10] Acceptance "subject to drawing contract,"[11] or "pending issuance of formal contract"[12] have been held not to destroy the binding effect of preliminary agreements, and an acceptance subject to a statutory necessity for formality has also created an enforceable contract.[13] Another factor which is of value in discovering the intention of the parties is the existence of a business practice for these parties, or parties in similar commercial circumstances to culminate this type of negotiation in a final formal writing.[14] This in itself should not be determinative, for the fact that previous negotiations have culminated in formal agreements does not mean the parties do not feel themselves bound until the formal agreement was executed.

Care should also be taken to distinguish a mere invitation to deal, from an offer capable of being accepted, thereby creating an enforceable contract. In the frequently quoted case of *Scott v. Fowler*,[15] where the defendant's final correspondence stated "if they want farm subject to lease, then I can talk trade with them, otherwise I cannot," the court failed to draw this distinction and later cases have erroneously treated this as an offer not enforceable when accepted because of a further stipulation as to a need for a reduction to a formal writing;[16] when it should have been treated not as an offer, but as a mere invitation to deal.

[8] See Patterson, The Delivery of a Life Insurance Policy, 33 Harv. L. Rev. 198, 218 (1919). The possibility of holding the insurance company liable on a tort basis for unreasonable delay in acting on the application is discussed in Prosser, Delay in Acting on an Application for Insurance, 3 Univ. Chi. L. Rev. 39 (1935).

[9] Mississippi & Dominion Steamship Co. v. Swift, 86 Me. 248, 29 Atl. 1063 (1894).

[10] See cases cited in note 2 *supra*. *Cf. dicta* in El Reno Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642 (1920); W. T. Grant Co. v. Jaeger, 224 Ill. App. 538 (1922). See also German Civil Code, § 127 (1896).

[11] Briggs & Turvias v. United States, 83 Ct. Cl. 664 (1936).

[12] American Smelting & Refining Co. v. United States, 259 U.S. 75 (1922).

[13] United States v. Purcell Envelope Co., 249 U.S. 313 (1919).

[14] See El Reno Grocery Co. v. Stocking, 293 Ill. 494, 127 N.E. 642 (1920), where evidence as to trade usage was held properly admissable as one factor in determining the intention of the parties. *Cf.*, however, Geary v. Great Atlantic & Pacific Tea Co., 366 Ill. 625, 10 N.E. (2d) 350 (1937), and cases cited in notes 10, 11, and 12 *supra* where the court did not consider this factor in making their decision.

[15] 227 Ill. 104, 81 N.E. 34 (1907).

[16] Walsh v. Fallis, 266 Ill. App. 341 (1932).

In the instant case, while it is arguable that since the prior dealings of the parties resulted in formal agreements, the parties here intended not to be bound unless a similar formal agreement was executed;[17] it would be preferable to hold there was a binding contract, since all the details had been agreed upon, and the formal writing contained no terms other than those to which the defendant had assented, and since the statement, "This memo becomes void when sale is covered by contract," most likely contemplated the binding effect of the memorandum, and certainly not an intention not to be bound.

Corporations—Right To Withdraw a Registration Statement Filed with the Securities and Exchange Commission—[Federal].—A corporation, attempting to register 35,000 shares of its common stock, filed a registration statement with the Securities and Exchange Commission. The day after the registration statement became effective, but before any of the registered stock had been sold, the commission notified the registrant that a hearing was to be held to determine whether a stop order should issue suspending the effectiveness of the statement. After several hearings had disclosed that shares of the same stock, issued before the Securities Act of 1933, were outstanding in the hands of the public, the corporation moved for leave to withdraw its registration statement. The commission denied the application to withdraw on the grounds that withdrawal would not be consistent with the public interest and the protection of investors. The respondents, officers of the corporation, refused to testify further, and the commission applied to the federal district court for an order requiring the respondents to comply with the terms of a subpoena. *Held*, order will issue. The respondent cannot withdraw as of right under the circumstances of this case. *Securities and Exchange Commission v. Hoover.*[1]

Whether or not a registrant can withdraw his registration statement was considered by the United States Supreme Court in *Jones v. Securities and Exchange Commission.*[2] In that case the Court held that since the registration statement had not yet become effective and since no stock had actually been issued, the commission could neither deny registrant the right to withdraw nor compel the giving of testimony and the producing of evidence at public hearings. In reaching its decision the Court relied upon the general rule of law that a plaintiff can withdraw his complaint at any time before final decree[3] unless withdrawal will prejudice the defendant in some way other than mere vexation from future litigation.[4] The Court denounced further investigation as an unlawful "fishing expedition."[5] Although the decision in the *Jones* case

[17] See cases cited in notes 14 *supra.*

[1] 25 F. Supp. 484 (Ill. 1938). See Resources Corp. Internat'l v. S.E.C., C.C.H. Sec. Act Serv. ¶30,099 (App. D.C. 1939).

[2] 298 U.S. 1 (1936).

[3] See *Ex parte* Skinner and Eddy Corp., 265 U.S. 86 (1924); McGowan v. Columbia River Packers' Ass'n, 245 U.S. 352, 358 (1917).

[4] See Pullman's Palace Car Co. v. Central Transportation Co., 171 U.S. 138, 145–6 (1898); Welsbach Light Co. v. Mahler, 88 Fed. 427 (C.C. N.Y. 1898).

[5] For condemnation by the Court of investigations made with the hope that a violation of the law will be discovered see Federal Trade Commission v. American Tobacco Co., 264 U.S. 298 (1924); Ellis v. Interstate Commerce Commission, 237 U.S. 434, 445 (1915). For general discussion see Mechem, Fishing Expeditions by Commissions, 22 Mich. L. Rev. 765 (1924).