PROMISSORY LIABILITY. I*

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The simple needs which appear first in the development of contract are easily observed. As the importance of promises becomes apparent, form and magic are used to give certain promises significance. So, children spit and gamblers shake hands to bind a bargain. The hand shake is ancient. The use of mechanical symbols or particular verbal formulae appears; and in Norman England the sealed impression acquires the effect of form.

The borrowing of a thing is a simple affair. The obligation of the borrower to return has both proprietary and promise aspects. Similarly the borrower of money, though he is required to return only an equivalent, may easily be regarded as having money belonging to the lender. It is a short step to the obligations of seller to hand over, and buyer to pay; or to the obligation of agent or partner to account.

The importance of returning, or making a return for, something, when there is a promise to do so, is thus apparent, where there are any of the impulses connected with private property. If a lender has advanced money on the faith of a promise of someone other than the borrower, however,

* This article is a summary of the ideas controlling the contents and organization of a case book edited by the author for use in the first year course in the University of Chicago Law School. The case book was first used and published serially in mimeographed form in the year 1937-1938; and this summary was prepared, to aid students and teacher, in the year 1938-1939. Only the cases used, together with the minimum references necessary to help clarify the thought, are cited. At every point, of course, appear problems which merit more detailed treatment. In such a matter, adequate acknowledgments are both unnecessary and impossible; but it should be said that Professor Rheinstein, in the course of joint seminars, and Professor Kessler, in the course of joint first year teaching, have taught the author a great deal. Like many others, the author studied under Professor Williston and still relies on his writing as a fertile source of knowledge, ideas, and provocation in the field of contract law. The general scheme of which this article is an expression is outlined in Sharp and Gregory, Social Change and Labor Law (1939).

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it may be more difficult to see that the surety has himself received anything for which to make a return. But the creditor is worse off because of the surety's promise; he has in this sense been hurt and it is primarily for this reason that he should be protected.

It is familiar, of course, that this notion of hurt has played a leading part in the development of Anglo-American ideas of contract. One who represents that he is competent, thus promising to do a good job, and then cuts a face in shaving, drowns horses in ferrying them, builds or rebuilds a house badly, cures a horse to death, has made the other party suffer. One who undertakes to perform and receives in return performance from another, has not only something for which to make a return, but he has made the other party suffer a detriment. Those who exchange promises even have put themselves in a practical predicament. If either violates his promise, he is likely to lose his commercial standing with the other. A third party, indeed, whose debtor has got a promise from a promisor to pay the third party, has now suffered nothing as a result of this arrangement. He is not the victim of a wrong; though the terms of the promisee's and promisor's arrangement should perhaps be carried out, at least if the promisor has received something for which to make a return and the promisee has in the interval not objected to the return being made to the third party.

The significance of a promise by itself has not, as yet, appeared to us, though it has on the continent of Europe.

Englishmen, like Romans, have experienced some difficulty in extending their notions about promises and law. They have, of course, had a rather special difficulty in the caution observed by the King's courts in extending their work and creating the common law. The cases had to fit the changing and expanding pigeonholes of the writs. So, in a groping and unsystematic way, there was debt in the twelfth century, to be followed by the younger similar writs of detinue and account. Covenant may be associated with the thirteenth century. Rudimentary assumpsit has its first growth in the fourteenth and fifteenth centuries. Mature assump-

1 Sands v. Trevilian, Cro. Car. 193 (1628).
2 Watton v. Brinth, 2 Hen. IV 3, 9 (1400); Horse Doctor's Case, 19 Hen. VI 49, 5 (1440). The breakdown of the significance of misfeasance as distinguished from nonfeasance appears in Anonymous, 3 Hen. VII 14, 20 (1488).
3 Anonymous, Keilwey 77 (1504).
4 Compared with the difficulty surrounding earlier steps, this discovery was made with no discussion or explanation. See, e.g., Strangborough v. Warner, 4 Leon. 3 (1588).
5 Bourne v. Mason, 1 Vent. 6 (1669); Crow v. Rogers, 1 Str. 592 (1725); cf. Dutton v. Poole, 2 Lev. 210 (1677).
sit appears in the sixteenth century. Then assumpsit triumphs, at the expense indeed of a step backward in forgetting older learning about third parties.

Finally, in the nineteenth and twentieth centuries, the forms went, beginning in New York, going on in England, and culminating a few years ago in Illinois. While rights have been defined by the outlines of the forms, it seems likely that rights will go on developing as in the past, and perhaps more freely without the forms.

In particular, the promise by itself, here as in Europe, may take on increasing significance.

I. PROMISE AND CONTRACT

I. STATEMENT OF INTENTION AND PROMISE

It is the offer which may start the trouble. A salt buyer receives a communication from a salt seller addressed to him personally, reading "we are authorized to offer" salt at a specified price in unspecified quantities. There is a reference to "rupture in the salt trade." The buyer orders two thousand barrels, an amount the seller might reasonably anticipate. It has been held that there is no offer and so no contract.

After negotiations in which the word "quote" appears, together with a price list for flour and bran "subject to change without notice" and a boast that the prospective seller will "meet all competition in prices," the buyer inquires about a price for bran. He names a price at which he can buy at his place of business, and adds "If you will sell us at the same price wire us this A.M. as we have an order to fill." The same day the seller replies by letter, "cannot sell bran for less than" a named price. There is no reference to quantity. The next day, on receipt of the letter, the buyer wires ordering fifty tons, a not unreasonable quantity. It has been held that there is an offer, which has been accepted, and so a contract.

After negotiations about the sale of land, in which uncertainties about

6 Slade's Case, 4 Co.*92b (1603). Note the commercial influences appearing here as well as in the greatest English case on freedom of contract, decided in the same year, with the same Chief Justice, Popham, presiding, The Case of the Monopolies, 11 Co.*84b (1603). The influence of this case on freedom of contract in American law appears in Mr. Justice Field's treatment of it, in his dissent in the Slaughter House Cases, 16 Wall. (U.S.) 36 (1873).

7 Compare Harris v. Peter de Bervoir, Cro. Jac. 687 (1624) (debt); Rolle Abr., Detinue (c) 1 (1668) (detinue); Harrington v. Deane, Hobart 36 (1613) (account), with the cases cited in note 5 supra; see 4 Page, Contracts §§ 2374-80 (1920).

8 Moulton v. Kershaw, 59 Wis. 316, 18 N.W. 172 (1884).

9 College Mill Co. v. Fidler, 58 S.W. 382 (Tenn. Ch. App. 1899).
the vendor's wife's willingness to release her dower interest have appeared, and $50,000 has been mentioned by the vendor, the purchaser writes the vendor "Will you and your wife accept $49,000?" The vendor replies, "I will not sell for less than $56,000." The purchaser wires "I will accept." It has been held that there is no offer and hence no contract. ¹⁰

What is it that a sensible business man is looking for in such a series of communications? We say an offer, as distinguished from a mere statement of intention or invitation to deal, and we find that when we examine the matter further, we begin to talk naturally about promises. The offer which may be significant in these situations is also a promise.

What then is a promise? When we examine what are verbally offers made in jest or as expressions of anger, and when we examine the effect of words used with the understanding that a final memorandum of agreement is to be made later,¹¹ we find the problem appearing again. The "agreement" to keep a social engagement seems not infrequently to be something less than a promise. The Restatement of Contracts says that a promise is an undertaking that something shall or shall not happen.¹² But what then is an undertaking? We return to the same hunt for the distinguishing feature of a promise.

As a matter of everyday experience and common usage, a promise has something reliable about it. In the bare case, in spite of the ambiguity of the words used and vagueness about the terms, a striking circumstance is that the buyer has told the seller that he has an order to fill. He has almost, if not quite, said that he is going to count on the reply to his inquiry. The reply must be read in relation to the inquiry. The seller seems to be saying you can rely on this proposal, first in your thinking and then in the conduct of your affairs. It is, therefore, a promise whether or not it contains conditions, for example, about acceptance and performance.

It may be suggested that a promise is the maker's statement about his future conduct so made that the maker should expect the person to whom it is made mentally to rely on it as dependable.

It will be observed that the maker's actual intention is not regarded as important; and this is true at least in the courts. A promise might indeed be so defined as to take care of ordinary qualifications made by the courts

¹² Rest., Contracts § 2 (1932); cf. §§ 24, 25.
in cases of mistake, impossibility, default, illegality, and similar circumstances. It seems, however, that the definition suggested corresponds rather accurately with ordinary usage, and in addition indicates the degree of importance which courts give to "objective interpretation."

At this point the extent to which business men and courts alike are interested in the careful use of language in business matters is to be emphasized. By shifting much of the loss resulting from careless language to the person who has been careless in using or understanding it, we serve purposes similar to those served, for example, in automobile accident litigation.

There is a degree of punishment and guidance, as in the criminal law. Where business men have an opportunity to get advice in advance of talking, the significance of guidance is indeed considerable.

There is, moreover, the other purpose which runs through the law governing civil litigation. Someone has, in a sense not yet defined, suffered a business loss, a loss of property. It was his property; and our social system is built very largely on protection to private property interests. If one's body is made useless by an automobile accident, or his fortune lost as the result of confusion in a business undertaking, it creates a problem. The loss should be restored, if it can be done not at the expense of some other similar property interests. An intelligible way of dealing with the difficulty, though not by any means the only intelligible way, is to say that the person at "fault" must bear the loss.

Thus we say that the maker of a promise is one who ought to expect another to rely on his statement. But in case of a communication which is on the line between a promise and a mere expression of intention, what is to be done? The communication in the bran case is nearly, if not quite, of this type. An impartial person, after considering words and circumstances, may be unable to make up his mind how the words should be understood. In such a situation we shall say, if we follow the rules about automobile accidents, that there is no promise. The person who says he has relied on another's word has a kind of burden of showing that the other was in the wrong. It is not, in the ordinary sense, either a burden of proof or a burden of coming forward, but a kind of burden of argument. He has to give affirmative reasons for deciding that the other has not acted in accordance with ordinary standards of business communication, in making his statement.

So far we have been talking of offers which are promises. There has been disproportionate discussion of the offer which is not promissory. Promises may be made without any agreement; and agreements may be made with-
out any promises. For example, there is the possible simultaneous ex-
change of money and merchandise with an understanding that the seller
makes no warranties; this is the pure grant.

The promissory offer may be defined as the first promise made in the
course of creating contractual relations. The definitions of promise and
promissory offer suggest possible definitions of grant and of the offer which
may be made by a grant; for example, the payment of money, as a first
step in creating contractual relations.\textsuperscript{13} The importance of this type of
transaction has, however, been exaggerated; and we may leave others to
develop the definition of offer by grant.

2. INTERPRETATION AND "PAROL EVIDENCE"

In determining whether a promise has been made, we have observed
that the maker's actual intention is for our purpose at present irrelevant.
Similarly in determining what has been promised, it is not important at
this stage of our discussion to consider the actual understanding of either
promisor or promisee. Both are required to make and understand sym-
bols with such skill as is thought to be more or less normal in the business
community.\textsuperscript{14} Thus an insurance company making a contract of mari-
time insurance in Boston in 1827 should know that the terms "coppered
ship" used by the insured in New York about a ship in New York harbor
may have a different meaning from the meaning those terms have ordi-
narily in Boston.\textsuperscript{15} The insurance company is more expert in such matters
than the owner is, and the insurance company is, therefore, acting less
than reasonably, if it does not take care that such terms are understood in
the same sense both by it and by its New York correspondent.

An aberration in the cases serves to bring out the general rule.\textsuperscript{16} It has
been held in some jurisdictions that one who makes an offer as a first com-
munication, by telegram, takes the risk of errors in transmission. This ap-
pears to be comparable to a rule that everyone who drives a car takes the
risk of all accidents which the car may occasion. One who drives knowing

\textsuperscript{13} After preliminary negotiations for the sale of a book without warranties, for example,
the first operative act may be the physical transfer of the book. While even here, the act has
some promissory implications, it is an act primarily implying present "grant," with its re-
ference to the grantor's future duties reduced to a minimum. See the discussion beginning in

\textsuperscript{14} In some types of transaction, accordingly, great precision is required, Bank of Italy v.
Merchants Nat'l Bank, 236 N.Y. 106, 140 N.E. 211 (1923).

\textsuperscript{15} Hazard v. New England Marine Ins. Co., 8 Pet. (U.S.) 557 (1834) (reversing Mr. Justice
Story).

\textsuperscript{16} See 1 Williston, Contracts § 94 (rev. ed. 1936).
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of his defective brakes, may indeed assume the risk of accidents. But one who uses an ordinary car, though he knows well that accidents may result, is not, therefore, held to have assumed the risk of all accidents. So the decisions seem preferable which hold that one who uses an everyday agency like the telegraph office does not assume the risk of the occasional errors in transmission which are known to occur.

It will be noted that we have now said that care must be used by both parties to communications. If the promisor is careful and the promisee careless, the promisor's understanding will control, in the event of misunderstanding. If both are careful or both careless, neither understanding will control, and there will be no effective communication in the event of misunderstanding.\(^7\) The problems suggest again the analogy of negligence and contributory negligence in automobile accident litigation. The specific possibilities which the analogy suggests will be left for later reference, in connection with the treatment of damages and mistake.

The effect of writing on interpretation is a subject of difficulty and has had a rather long evolution. Leaving aside the rather unimportant question whether different rules apply to unintegrated and integrated writings,\(^8\) let us examine some of the rules supposed to apply to the latter.

The significance of a "plain meaning" of words in a written discussion has been very much limited. Other portions of the document and surrounding circumstances may show that the meaning is not plain at all, and may be used in turn to clarify the true meaning of the words.\(^9\) Usages of various sorts are admissible; a trade usage for example to show that 50 per cent protein means not less than 49.5 per cent protein.\(^10\) The chief remaining difficulty is about a mutual understanding that "plain" words are to have a different meaning from their normal one. A moment's reflection will show that objective theory requires that mutual expressed understanding about the meaning of any words should be given full effect. The writers and perhaps the decisions appear now to be moving in this direction. For example, a mutual understanding, together perhaps with some

\(^7\) Falck v. Williams, [1900] A.C. 176. A regard for legitimate business expectations helps in the treatment of joint obligations, "third parties'" rights, bona fide purchasers, and other multiple party relationships. See, for example, the Uniform Joint Obligations Act and the statute proposed in Harvey, The Victims of Fraud (1932). The latter statute does not, however, deal adequately with cases of misunderstanding or mistake equally reasonable or unreasonable on each side. See Jenks, The Legal Estate, 24 L. Q. Rev. 147, 155-6 (1908). See note 56 infra, and pt. II, notes 121, 125.

\(^8\) See Grene, Theories of Interpretation in the Law of Contracts, 6 Univ. Chi. L. Rev. 374 (1939).


other rather unpersuasive extrinsic evidence, has been admitted to show that an undertaking by a grantor to “pay all taxes and special assessments chargeable to said premises up to the date of this deed” meant not “chargeable” but accrued.21

What is sometimes regarded as a rather special rule against the proof of “collateral” understandings where a contract or grant has been integrated, appears to be taking its place also as a part of the general principle of objective interpretation. The court indeed first considers whether it is sensible to suppose that such a collateral understanding in view of all the circumstances might in fact have been made and not been superseded by the writing. There is here again only recognition of the common sense observation that a complete writing has great significance as an indication of how the parties ought to have understood each other. Once, however, it appears to the court that the parties might reasonably have supposed their understanding to include the collateral arrangement, the question of whether such an arrangement was finally made is open to proof.22

So in case of mutual mistake of expression, the tendency to attribute formal or magical significance to writing, doubts about the jury, the separation of law and equity, have tended to obscure how simple a matter reformation for mistake of expression is. The parties’ objective expressions of their understanding are all given effect; but it turns out, where reformation is granted, that the writing is an inaccurate indication, as compared with other indications, of the parties’ understanding.23 The problem of mutual mistake of expression is of an entirely different order from the more difficult problems arising out of unilateral mistake of expression or unilateral or mutual error about facts.

3. ASSENT

A promissory offer has been defined as the first promise made in the course of creating contractual relations. The word seems to suggest to the ordinary mind that some response is expected. It may be observed at once that a promise may be made with no expectation of any response what-

21 Firestone Tire & Rubber Co. v. Werner, 204 Wis. 306, 236 N.W. 118 (1931). Though the interpretation of a writing is said to be for the judge, on the introduction of evidence to clarify ambiguity the interpretation is for the jury, Keyser v. Weintraub, 157 Md. 437, 146 Atl. 275 (1929).


ever. It must, of course, come to the attention of the promisee at some time to be a promise in our sense. The words may, however, conceivably create legal consequences even before they come to his attention. There is perhaps, therefore, an arbitrary element in the definition of offer suggested; as an offer, according to this definition, may be made without reference to any expression of assent or acceptance whatever. It should, however, be noticed that any such a promise may be rejected.

A formal, sealed writing, purely beneficial to the promisee, may according to the implications of some decisions be partly effective even without a parting with the possession of the instrument, and before its execution has come to the attention of the promisee. Parting with possession of an instrument is indeed generally required; but there is considerable authority that such a formal act, is "effective," subject to rejection, before the promisee knows of it.\textsuperscript{24} The situation is a rare one, and the rule—while perhaps sensible—of limited application. It serves as a reminder, however,

\textsuperscript{24} Similar rules apply to the consequences of the acts sufficient for legal "delivery," in handling "commercial specialties." In fact, there was usage and so agreement in advance on the effect of action short of physical riddance of possession, in creating obligations expressed in an insurance policy, and this understanding was given effect, in one leading case, Xenos v. Wickham, L. R. 2 H. L. 256 (1867). The cases dealing with the necessity for "delivery" of negotiable paper do not distinguish systematically between the effect of delivery on a promise and its effect on a grant; and generally the rules applicable to sealed obligatory writings and commercial specialties are closely correlated with the rules applicable to grants. Two Illinois cases dealing with grants are therefore suggestive. In one an unqualified act falling short of physical riddance of possession, and not assented to in advance nor at the significant time afterward, was held, at least alternatively, to effect a purely beneficial grant of rights in a negotiable note, subject only to rejection, Williams v. Galt, 95 Ill. 172 (1880). In another, unqualified riddance of possession without assent was held not sufficient to effect a purely beneficial chattel mortgage described in the paper in question, Talty v. Schoenholz, 323 Ill. 232, 154 N.E. 139 (1926). The cases are inconsistent with each other, and with the authorities, which regard unqualified riddance of possession as necessary and sufficient, subject to rejection, for the creation of a purely beneficial obligation or grant by the use of specialty writings. They are, however, instructive in reminding us emphatically how arbitrary or at least conventional is the sweeping requirement of common law acceptance, apart from the equally arbitrary or conventional requirement of consideration, in "simple contracts," Some Aspects of Delivery: Specialties and the Uniform Written Obligations Act, 3 Univ. Chi. L. Rev. 488 (1936). It should be noticed, however, that it is odd to give legal effect to words which have not yet satisfied the definition of promise by coming to the attention of an addressee; and if the result is to prevent an actual change of mind before this time, it is unnecessary and unfair, note 30 infra. But that there is nothing unthinkable in making a promise binding without common law acceptance appears further in the treatment of preincorporation stock subscriptions, perhaps even originally the result of statute, and the treatment of bids under familiar statutes. Richelieu Hotel Co. v. Int'l Military Encampment Co., 140 Ill. 248, 29 N.E. 1044 (1892) (with an element of "estoppel," which appears, however, not to be clearly operative, under the Illinois decisions to be referred to later); Wheyton Bldg. Chamber Co. v. Boston, 204 Mass. 218, 90 N.E. 598 (1910). See Ill. Rev. Stat. (1939) c. 32, § 157.16.
that a promise itself may be fully effective on communication, without even mere assent on the part of the promisee, to say nothing of common law acceptance.

Very commonly, though by no means always, a business offer does, however, indicate an understanding on the part of the offeror that his statements are to be relied on subject to a condition about an exchange or promise of exchange on the part of the offeree. The offer may on the other hand be "expressly" or "impliedly" a firm offer. That is, it may include a promise that the offer shall be kept open for a specific or reasonable time. In the absence of form, consideration, or estoppel such a promise is not binding at common law. Its treatment will be discussed more fully later.

The business offer which does not contain affirmative indications that it is to be firm, suggests—as has been said—the presence in every provision of important conditions. It may perhaps be relied on only to a limited extent. The offeror may often be understood as saying: "I make you this promise now; but it will become ineffective if I let you know of a change of mind before you have agreed on our bargain, or if you do not agree within a reasonable time, or if you reject the offer, or—what amounts to the same thing—try to make a different bargain from the one I have suggested."

The recognition of the conditional character of many offers enables one to see the good sense in some decisions which at first appear to depend on rather arbitrary notions of acceptance and consideration. If one agrees to give something in exchange for a promise to extend the payment of a debt, actually refraining from collecting without the promise to refrain, neither satisfies the condition of the offer nor amounts to reasonable reliance. A seller similarly may often have good reasons for wanting to feel free to revoke his offer up to the moment when the buyer acts or promises in some specified way in return. If an offer is to be understood as reserving this right, the reservation should, of course, be given effect. It may further be ordinary business understanding that an offer for a bargain is revocable until the bargain is made, and to this extent, our common law view is sound. To say, however, that a firm offer will not be given effect according to its terms, is something quite different.

The standard common law view is, of course, that an offer is not binding until the precise act is done or the specific promise made which is asked for in exchange. The limitations and difficulties of this view appear in two

25 Edgerton v. Weaver, 105 Ill. 43 (1882).
26 James Baird Co. v. Gimbel Bros., 64 F. (2d) 344 (C.C.A. 2d 1933) (at least an alternative, and it seems the controlling ground of decision).
sets of cases. In both, there appears the influence of a business notion that somehow in some circumstances an ordinary offer becomes irrevocable and firm at some point prior to common law acceptance.

One line of cases involves the offer to make a return for a continued act or series of acts, and the effect of attempted revocation after the action has been commenced and before it has been completed. By the aid of various artificial efforts at "construction," most writers have sought to find some way of protecting the offeree, and courts, in the few cases which have been presented, have contrived in a more or less confused way to hold the offeror bound. As in the case of the common law auction without reserve, we seem to have here an example of estoppel, which may be reserved for discussion later.

A somewhat more striking and more familiar situation is presented by the contract by correspondence. If an offer asking for a promise in return is sent by particular means of communication, and a "communication" corresponding with the terms of the offer is dispatched by the same means by the offeree, his "communication" is said to be an acceptance from the moment it is dispatched. However our working notions are considered, it is of course impossible to say that by words in a letter any real communication or any return promise is made until the so-called letter of acceptance comes to the attention of the offeror. The Anglo-American rule is in fact three rules. The first and most easily justified is a rule limiting the offeror's power to revoke from the moment the acceptance is mailed. Here is an indication that offers, at least after a certain point, are or should be more commonly regarded as firm than one would expect from the ordinary statements of our law. The second rule puts the risk of loss on the person who has chosen the agency of communication. What has already been said about the assumption of risks of error in transmission seems to throw considerable doubt on the soundness of this rule. The third rule, if it is indeed a rule, is indefensible. It would prevent the offeree from destroy-

27 As by going beyond the limits of a proper presumption of an exchange of promises, in the instructive situation in Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902).

28 See Rest., Contracts §§ 27, 45, 90 (1932).

29 Consider the difficulties faced in the original decisions, McCulloch v. Eagle Ins. Co., 1 Pick. (Mass.) 278 (1822), which did not prevail, and Household Fire Ins. Co. v. Grant, L. R. 4 Exch. Div. 216 (1879), which though dealing with a distinguishable problem, helped settle the law on this subject.

30 Cf. Traders' Nat'l Bank v. First Nat'l Bank, 142 Tenn. 229, 217 S.W. 977 (1920), noted in 9 A. L. R. 386 (1920); Guardian Nat'l Bank v. Huntington County State Bank, 206 Ind. 185, 187 N.E. 388 (1933), noted in 92 A. L. R. 1062 (1934); see note 24 supra, and notes 33, 45 infra. A promisor and non-promisor are distinguished.
ing the effect of his acceptance by a communication which reaches the offeror ahead of the so-called acceptance.\textsuperscript{31}

The difficulties about silence and cross offers seem to have been exaggerated. A recognition that promises are relatively simple affairs would dispel much of the mystery. For example, in the case of cross offers there seems to be little objection to what appears to be the New York rule, that such a set of promises may constitute a contract.\textsuperscript{32}

In the case of silence, it should be recognized that silence by itself, at least in the absence of a real intention to accept,\textsuperscript{33} will hardly be given legal effect. Prior dealings, ordinarily involving initiative on the part of the offeree, appear in the cases in which silence has the effect, or some of the effects, of acceptance. Thus, the surrounding circumstances may make it unreasonable for an offeree to remain silent.\textsuperscript{34} He should, in these circumstances, anticipate that his conduct will be depended on by the offeror as indicating assent. It may be that in the same situation, after a period of silence, the offeree will not be justified in supposing that the offer remains effective or that he can depend on it. In such a case the offeree

\textsuperscript{31} For a continental European lawyer's approach to these rules, see Nussbaum, Comparative Aspects of the Anglo-American Offer-and-Acceptance Doctrine, 36 Col. L. Rev. 920 (1936). It is indicative of the uncertainties in this field that while an offer by correspondence which requests or even requires a promise in return, will be held binding before words are communicated, and thus before a promise is made, in return; yet in some classes of cases involving offers in return for acts at a distance, something more than the act has commonly been held necessary finally to bind the offeror. Cf. Midland Nat'l Bank v. Security Elevator Co., 162 Minn. 30, 200 N.W. 851 (1924), which takes what seems the preferable minority view.

\textsuperscript{32} Morris Asinof & Sons v. Freudenthal, 195 App. Div. 79, 186 N.Y. Supp. 383 (1921), aff'd 233 N.Y. 564, 135 N.E. 919 (1922). But see Rest., Contracts §§ 23, 53 (1932). An advertised offer of reward, for example, must, however, commonly be read as addressed only to those who, with knowledge of it, though not necessarily because of it, do the requested things.

\textsuperscript{33} A sensible pair of businessmen who each actually understood silence to conclude a bargain, without independent good reason for doing so, would be likely on ordinary second thought to feel considerable uncertainty about the matter; and their reasons for uncertainty ought from the start, it seems, to make it impossible to find the offer and acceptance which are conventionally required for a contract. The appearance of "subjective" theory in the Restatement of Contracts, Section 72 (1) (b), while at first sight harmless, might lead to unfairness in the case of second thought just suggested. So, if the offeror without independent good reason considers silence an acceptance, and the offeree at an appropriate time considers it acceptance also, but later changes his mind and then first communicates with the offeror; the offeree has done or omitted nothing which should ordinarily cause harm, and there seems no adequate basis for liability; cf. note 30 supra. Somewhat comparable difficulties may occur in the application of the rule stated in Restatement of Contracts, Section 63. Suppose, for example, an offeror's attempted revocation after or before a not unreasonable time for response, and before a reasonable time for notification after complete performance rendered with intention to accept an offer for and in effect conditioned on a return promise. On "objective" theory should not the revocation be effective? See notes 25, 26 supra.

\textsuperscript{34} Cole-McIntyre-Norfleet Co. v. Holloway, 141 Tenn. 679, 214 S.W. 817 (1919).
might be bound, though the offeror is not bound. The treatment of silence on the part of an offeree as a "tort" would thus express the resulting relationships.

Finally we are in a position to remind ourselves that, as the Restatement says, "A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty."  

4. LAPSE AND REVOCATION

An offer may lose its legal effect by lapse, revocation or dissent. Lapse is a matter of objective interpretation. Either circumstances or words or both, may indicate how long an offer may be depended on. Thus, for example, in case of an offer by mail to be accepted within a named period, the question may arise whether the period begins to run from the date of the letter, its postmark, its receipt, or a reasonable time from date or postmark in view of the ordinary course of mail. Generally, one of the last reasonable time solutions will be preferable; and tests of when an offer is first effective and when an acceptance takes effect have at most only some relevance.

Similarly, in the absence of the peculiar practical factors which determine the effect of starting to communicate an acceptance, the normal objective test applies to the time of revocation. A revocation is not effective until fully communicated and Mr. Justice Holmes says "it would be monstrous" to follow a different rule. That a different rule has been followed in cases of advertized offers and in dealing with the effect of an offeror's death, serves only to emphasize the justice of Mr. Justice Holmes' observations.

Unlike an indirect offer, acceptance, or rejection, an "indirect revocation" may be effective. The effect of an indirect revocation is perhaps

35 Professor Llewellyn, in an instalment of his current series in the Yale Law Journal, makes and develops this suggestion.


37 See Rest., Contracts § 1 (1932).

38 Loring v. Boston, 7 Met. (Mass.) 409 (1844); In the Matter of Kelly, 39 Conn. 159 (1872); Van Camp Co. v. Smith, 101 Md. 565, 61 Atl. 284 (1905).


42 Dickinson v. Dodds, 1 L. R. 2 Ch. Div. 463 (1876). Threlkeld v. Inglett, 289 Ill. 90, 124 N.E. 368 (1919), seems contra, though the facts as to notice are not clear, and there is an element of estoppel which is not relied on and which is not controlling under the Illinois authorities.
more comparable to lapse than to ordinary revocation. It indicates to the offeree that he can no longer depend on the offeror's promise. The rule seems not unfair, and might perhaps be extended in clear cases to apply to other kinds of communication.

5. DISSERT

An offer loses its force, further, upon the communication of dissent. The offeror may then feel safe in making new arrangements, inconsistent with his previous proposal.

In case of doubt, an ambiguous response to an offer is a rejection. The cases indicate the other possibilities. There is, of course, the simple acceptance, conforming precisely to the terms of the offer. There is the inquiry, and the related mere request. While a counter-offer for present purposes is treated as a rejection, there is the possibility of a counter-offer expressly avoiding a rejection; and there appears to be no difficulty about giving such a communication its intended effect. Moreover, there is the possibility of combining an acceptance with a counter-offer; and apt words for this purpose should be regarded.

Nevertheless, with these alternatives available, the disposition seems to be to treat doubtful responses as rejections. While it might appear at first that the result is to make the author of the communication use clear words at his peril, this approach would be inconsistent with the disposition to treat communications as invitations to deal rather than offers. The principle which seems to reconcile the cases dealing with first communications and those dealing with responses seems to be the one already suggested in connection with offers. In case of doubt, a disposition to leave parties free from liability or risk of liability appears in the cases. To overcome this disposition, a party seeking to impose liability has a kind of burden of argument comparable to the burden carried by a plaintiff in a negligence action.

Like a revocation, a rejection presumably takes effect in the normal way on the completion of a communication. The adjustment of this normal rule to the unusual acceptance rule, in cases of correspondence, presents an interesting difficulty. The mailing of a rejection, followed by the mailing of an acceptance, followed by receipt of the rejection, followed by receipt of the acceptance, would, by one kind of mechanical treatment of conceptions, leave the parties bound. Such a rule would occasion con-


44 Cf., however, Hunt & Co. v. Higman, 70 Iowa 406, 30 N.W. 769 (1886).
siderable risk of unfairness to the offeror. Accordingly, it seems likely that in such a case the rejection would be held effective. This solution is a further indication of the unfairness and inconsistency with objective theory of any rule which would prevent an offeree from effectively withdrawing an acceptance from the mails or rejecting an offer by a communication sent after the mailing of an acceptance but reaching the offeror before receipt of the so-called acceptance.

6. PERFORMANCE OR BREACH

In considering the general theory of promises, and its part in contract law, some attention should be paid to the significance of breach as an element in the sequence of events which may create liability. The effect of conduct in anticipation of the time of performance, which creates uncertainty about performance, illustrates the significance and nature of breach.

The rule that such conduct may create a present cause of action for damages as for breach of the entire contract appeared in 1853. In a case arising out of a bilateral employment contract, it was held that the employer's flat refusal to perform in advance of the time for any performance gave the employee a basis for an action commenced before the time of performance. The opinion depends, to a considerable extent, on the correct view that such conduct may give an excuse for the other party or create a necessity for efforts to mitigate damages; and these two observations appear to be identified, improperly, with the conclusion that the cause of action arises at once. Similarly, a present breach coupled with refusal to perform obligations maturing later, creates a present cause of action for breach of the entire contract; here, whenever it is also an excuse for non-performance on the other side.

The doctrine of "anticipatory breach," in both its forms, is thus treated, unnecessarily, as corresponding in some way to supposedly parallel notions of excuse, damages and, sometimes, perhaps, procedural rules governing the "splitting" of actions. The most striking trace of the origin of the doctrine is the rule that in both its forms it applies, according to the accepted view, only where the anticipatory conduct is an excuse for another party to a bilateral contract. The rule is thus, according to the accepted view, not applicable to independent obligations, to unilateral contracts, to bilateral contracts performed on one side or to negotiable instruments (with the exception, perhaps, of a similarity in the dishonor of

45 See Rest., Contracts § 39 (1932); note 30 supra.
46 Hochster v. De La Tour, 2 El. & Bl. 678 (1853).
bills). The arguments most commonly advanced for the doctrine would seem, indeed, to apply to all such transactions. A maker's announcement that he will not pay a note, before the time when it is due, may, indeed, have serious consequences. It is true that to hold him in advance of the due date would require him to do acts which he never clearly promised to do. The same thing may, however, be said in any case of anticipatory breach. It is not apparent that acceleration on anticipatory repudiation would create any more problems about negotiability than the familiar contractual provisions for acceleration.

Because the doctrine always results in enforcing an obligation to do something a little different from what the promisor has in terms undertaken, it is not surprising that the promisor is allowed some opportunity for correcting the effect of his anticipatory conduct. In the case of wholly anticipatory conduct, for example, the promisor will not be liable, if, before the promisee has brought action or otherwise changed his position, the promisor retracts or corrects his repudiation. That the promisee has merely in terms elected to take advantage of the repudiation, without actually otherwise changing his course of conduct, makes no difference. So, the promisee's election in terms not to take advantage of the repudiation has no effect if subsequently, before retraction, the promisee does change his position. In the case of present breach, coupled with anticipatory repudiation, somewhat comparable rules presumably apply, in view of the general principles governing excuse.

It used to be said that a very clear-cut refusal is necessary if a wholly anticipatory repudiation is relied on as giving a cause of action. The sale of the subject matter of an executory contract of sale is said, however, to give rise to a cause of action; and this, with other indications, seems to show that the repudiation is effective if it would destroy the normal sense of security of the ordinary man. While less emphatic, wholly anticipatory conduct will serve for an excuse, it is not clear that there should be any distinction between the doctrines in this respect.

The peculiarity of the rules governing anticipatory breach has suggested that it should be classified separately as a tort rather than any ordinary breach of contract.47 Whatever may be said on the problem of classification, the phenomenon indicates strikingly the importance of psychological and practical reliability in promises. Anticipatory repudiation destroys reliability, and is thus not unnaturally given the consequences of breach of contract. An opportunity to retract before change of position

47 Compare Hochster v. De La Tour, 2 El. & Bl. 678 (1853) with Lumley v. Gye, 2 El. & Bl. 216 (1853), in the same volume of reports.
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may be appropriate. With this qualification, it seems likely that the consequences of anticipatory repudiation will be extended in the future. It should be observed, however, that in some situations, as in the case of disability insurance, the allowance of anticipatory damages may properly be refused on the ground that the traditional equitable remedy of specific performance or the declaratory judgment is more adequate to give the parties just what they expected than the action for damages.48

7. DAMAGES AND SPECIFIC PERFORMANCE

The examination of breach leads naturally to reflection on the kinds of harm which breaches may occasion, and the different remedies available for breach and threatened breach.49

The land contract and its treatment illustrate possible alternatives. In case of an ordinary default, the purchaser has been held entitled only to restitution and not to damages compensating him for the loss of expected gains, in many jurisdictions.50 In case of a default motivated by bad considerations, the purchaser can recover expectation damages.51 As a matter of course, mostly as the result of historical accident, the purchaser has the remedy of specific performance, whether or not damages would be "adequate" as a remedy.52

The alternatives thus appear rather sharply distinguished in this line of cases. Generally, a party has some choice of remedies in proceeding against the other party for default. In a more rational system indeed choice would not be required; and different kinds of protection would be cumulative, subject to safeguards against double accounting and double recovery. As it is, a disappointed promisee may choose between an action for restitution and an action for expectation damages. The right to restitution is indeed limited in various ways, for example, to prevent shifting all the loss of a bad bargain to the party in default in certain cases, as by making him pay more than the contract price.53 Again it is commonly

49 The treatment of damages in this section consists of observations on selected important parts of Fuller and Perdue, The Reliance Interest in Contract Damages, 46 Yale L.J. 52 (1936), 46 Yale L.J. 373 (1937). The extent to which underlying ideas are clarified by an examination of different kinds and measures of harm, appears clearly in these excellent articles; together with the references necessary for a further study of these topics. See also Mason, A Theory of Contract Sanctions, 38 Col. L. Rev. 775 (1938).
50 Flureau v. Thornhill, 2 W. Bl. 1078 (1775).
52 Kitchen v. Herring, 7 Ired. Eq. (N.C.) 190 (1851).
53 See Rest., Contracts §§ 350, 351 (1932).
said that mere expense of preparation cannot be recovered as restitution from the party in default, where he has received no part of what would, in common speech, be called performance.54

Here appears an element of harm which has not commonly been explicitly isolated in our judicial discussion of damages. It is easy to see that the party in default should make repayment for any benefits which he has received, preferably at their market value at the time of default, subject perhaps to the limitations referred to. Repayment for a gain made at the expense of another, and not depending on the terms of an "equal" bargain or a gift is, subject to some limitations, required by the assumptions of our system of property. Moreover, when it is observed in isolation, the harm done by the cost of preparation which results in no benefit to the other party, is equally a proper subject for compensation when the other defaults. Here, in reliance damages, the relation between "tort" and "contract" is exemplified, and we are reminded that if tort analogies have played an important part in the history of contract, they are likely to be recognized when they appear in the modern law.

Accordingly, it is clearly recognized that where the defaulting party has received some benefit from the other party, and where the other party seeks restitution, an item for expense of preparation in addition to the items for benefit received may be added to the plaintiff's relief. Indeed, where the plaintiff recovers restitution for part performance under a contract unenforceable because of the Statute of Frauds, he may recover reliance damages as well.55 The result seems sound, though it may depend psychologically on a dubious association between the idea of enforcement and the idea of expectation damages. Similarly, a plaintiff recovering restitution for part performance under a contract frustrated by impossibility, has been allowed to add an item for reliance damages.56 This result seems more questionable. The other party is not at fault in occasioning reliance and then not performing. Both are the victims of mischance, and both should be treated equally with respect to reliance damages, by an equal division of reliance losses. The variety of situations in which restitution is proper may indeed be distinguished by considering whether in particular cases an item for reliance damages should also be recoverable.

As in the case of restitution, the recovery of reliance damages will not

54 See Rest., Contracts § 348 (1932).
55 Randolph v. Castle, 190 Ky. 776, 228 S.W. 418 (1921); People's Nat'l Bank v. Magruder, 77 Fla. 235, 81 So. 440 (1919).
56 Moore v. Robinson, 92 Ill. 491 (1879). Professor Page in conversation early suggested the practical good sense of splitting some of the losses occasioned by impossibility somewhat as in comparable admiralty cases. See note 17 supra and infra, pt. II, notes 121, 125.
be permitted to shift the loss of a bad bargain entirely to the defaulting party. If expenses have been incurred in preparation for performance of the contract which is the subject of litigation, they may be recovered, not by way of restitution, but as an ordinary item of damage. Recovery will, however, be so limited as to prevent the plaintiff from getting more than he would have done had the contract been performed. If, however, in reliance on the contract which is the subject of litigation, the plaintiff has made preparations for transactions with others than the defendant, it may be that he will be allowed to recover by way of reliance damages in such a way as to put him in a better position than he would be given by either restitution or expectation damages.\(^7\)

The matter of course appearance of items of reliance damages in actions not described as actions for restitution, indicates considerable doubt about the supposed rule that reliance damages cannot be recovered in actions for restitution except as additions to a recovery for benefits conferred.

Restitution and reliance damages are, indeed, not thought of as “normal” contract damages. The function of contract damages which first occurs to ordinary lawyers, is to put a plaintiff in as good a position as he would have been in had the defendant’s promise been carried out.

A limitation on this measure of recovery indicates further the possibility of alternative treatments of damage, and also brings out clearly the function of familiar expectation damages. Expectation damages, and presumably reliance damages as well, are subject to the limitation that loss resulting from any peculiar situation in which the plaintiff finds himself can be recovered only if certain circumstances appear. If a plaintiff has incurred expense in preparation for the performance of another contract, the expense may be so extraordinary that a question arises as to whether a defendant who knew nothing of the plaintiff’s plans should pay for it. More strikingly, a plaintiff may have relied on the performance of a contract to enable him to make some profit on other transactions or avoid some loss in other affairs, of which the defendant, at the time of his promise, and perhaps also at its breach, was quite ignorant. Normally, it is thought, a defendant will compensate the plaintiff for the loss of his bargain if he pays according to a measure roughly expressed by the difference between contract price and market price. If the defendant is to compensate the plaintiff, for example, for loss of unusual gains, a limit on such compensation seems called for. Replacing an old foreseeability test,\(^8\) the tests appearing in the modern decisions appear to depend on whether the defend-

\(^7\) Nurse v. Barns, Raym. T. 77 (1664).
\(^8\) Hadley v. Baxendale, 9 Exch. 341 (1854).
ant indicated an assumption of the risk of these "consequential" losses, as by computing his compensation accordingly, or whether his breach was particularly blameworthy.\(^5\)

As has been said, the treatment of these consequential damage problems brings into relief the underlying notions of expectation damages. One purpose of restitution damages and the purpose of reliance damages is to put the plaintiff in as good a position as he would have been had the defendant never made his promise. The purpose of expectation damages is to put the plaintiff in as good a position as he would have been had the defendant kept his promise. The ordinary "tort" recovery is similar to the recovery of restitution or reliance damages, though occasionally—as in some actions for misrepresentation—something like expectation damages appears in tort cases.

In a discussion of the general theory of promises, some examination of the theory of expectation damages seems appropriate. Fuller and Perdue, in their article, "The Reliance Interest in Contract Damages,"\(^6\) have made the outstanding American contribution to a discriminating discussion of the theories underlying contract damages.

They observe that a good, and doubtless in many cases, a sufficient justification for applying the measure of expectation damages, is that it is the surest and simplest device for protecting parties against the risks of reliance. Reliance is often difficult to prove, as one sees in some of the cases of promises or transfers merely to secure an existing obligation, and when proved it may be difficult to measure. The propriety of protecting people to the extent of their reliance on contracts is fairly apparent. It may well follow that in a commercial community the expectation measure should be applied without too much opportunity for considering whether in every case it is entirely appropriate.

Apart from these considerations, there may be other justifications for the general application of an expectation measure. If one promises a child to take him to a baseball game, he may be much disappointed by default. The distress and insecurity occasioned in mature life by failure to keep promises may be an adequate reason for our judgment that contracts should be performed or compensation awarded in such a way as to give as nearly as possible the equivalent of performance.

Again it is sometimes said that a credit economy depends, to a peculiar extent, on the keeping of promises, or at least of contracts, and so the

\(^5\) See McCormick, Damages §§ 139, 141 (1935).

\(^6\) Fuller and Perdue, op. cit. supra note 49.
equivalent of performance should be given in case of breach. It is to be noted that if one understands credit in a limited sense, the force of this observation is likely to be lost. Credit, in the sense of relations analogous to those of lender and borrower, could be taken care of by restitution. A more exact statement of the relations between our economy and expectation damages, seems to depend on the observation that this is not only an industrial and credit economy, but also a risk taking, profit making, more or less gambling economy. This may mean not only that harmful reliance, in fluctuating markets, is best remedied by expectation damages, but also that the profits dependent on good guesses about the future are generally to be assured to the person who is willing to gamble on his judgment.

For whatever reason, the ordinary man apparently thinks naturally that promises should be performed or the equivalent of performance given. An indication of the force of ordinary opinion is seen in reactions to those cases in which the availability of specific performance has been limited by illusory and historical considerations.

There are perhaps good practical reasons for caution in decreeing the specific performance of employment contracts, though the difficulties supposed to surround the specific enforcement of "negative" provisions in such contracts appear to have been exaggerated. On the other hand, the objections to specific enforcement of building contracts or other contracts involving extended operations appear to be the result largely of rationalized historical caution on the part of chancellors. An extreme case of such rationalized caution is the mutuality doctrine of Lord Justice Fry, which appears now fortunately to have been eliminated from the law, and replaced by a doctrine having its proper place in the rules governing excuse.

The rules just referred to are spoken of as rules limiting the "exercise of jurisdiction" by chancellors. There remain the older rules which are said to define the "jurisdiction" of chancellors. These rules appear to be the result of intuitive adjustments in the seventeenth century, following the great conflict between Coke and Ellesmere in England. They depend

62 Jones v. Parker, 163 Mass. 564, 40 N.E. 1044 (1895) (within the recognized "exceptions"; but indicating doubt about the supposed "general rule").
63 Union Pacific R. v. Chicago, R.I., & P.R., 163 U.S. 564 (1896). Here Chief Justice Fuller spoke of "the intolerable travesty of justice involved in permitting parties to refuse performance of their contracts at pleasure by electing to pay damages for the breach."
64 Epstein v. Gluckin, 233 N.Y. 490, 135 N.E. 861 (1922); Zelleken v. Lynch, 80 Kan. 746, 104 Pac. 563 (1909) (agreements in contract for mining lease, treated like dependent agreements in lease; in the absence of threat of default by the plaintiff, "lack of mutuality" does not defeat his suit for specific performance).
on the peculiarities of English constitutional and judicial history. Their peculiarities of themselves hardly furnish an adequate basis for rules of law in the contemporary United States.65

If our justification of expectation damages is sound, it seems to follow that parties should normally be given not only an expectation equivalent, but the performance expected itself, so far as judicial machinery is available for the purpose. Thus, a farmer who has agreed on the purchase of a particular flock of sheep, should not have to spend time proving that the flock is in some peculiar sense "unique."66 If he wants the flock which he has selected, there seems to be no sufficient practical reason why a court should not order the person who has agreed to sell it, to deliver it on payment of the price. The same observations apply to such a commercial transaction as a contract for the sale of corporate stock.67

One conceivable practical difficulty appears to require some notice. If contracts are generally specifically enforceable at the election of the plaintiff, it may be thought that the consequences of the right to specific performance which appear particularly in land contracts, will appear in contracts generally, and thus produce troublesome confusion about "titles." Where sheep are the subject of a known executory contract of sale, may a lender safely make an advance to the seller on the security of the sheep?68 Even an honest lender may hardly know. The history of "equitable liens" furnishes some warning of the difficulties which might follow an effort to apply to contracts, generally, the uncertain and sometimes unfair rules governing equitable "property" interests.

Any legislation extending the remedy of specific performance should, indeed, explicitly guard against the dangers of uncertain and indiscriminating development of notions of equitable property. It may be that protection against persons who "in bad faith" interfere with the performance of contracts should be extended. Thus, Mr. Gye was enjoined from

65 See J Holdsworth, History of English Law 461, 463 (3d ed. 1922); 5 ibid. 322 (1924). Of course, there are cases where damages give the only remedy necessary, beyond much doubt; and where the remedy of specific performance will seldom be sought, and should perhaps be denied. An example is the sale of standard commodities with active and open markets, G. C. Outten Grain Co. v. Grace, 239 Ill. App. 284 (1925). Similarly, there are cases where relief by damages gives entirely unsatisfactory results, and the practical effectiveness of a suit for specific performance (or declaratory judgment) should make that normally the exclusive remedy, note 48 supra. Cf. St. Regis Paper Co. v. Santa Clara Lumber Co., 173 N.Y. 149, 65 N.E. 967 (1903).


interfering with Miss Wagner's singing although it is not suggested that Mr. Lumley had, in any ordinary sense, a property in Miss Wagner. So co-operative marketing acts provide against interference with marketing agencies' contracts by outsiders. A contract to break a contract is against public policy and unenforceable. The tort of inducement to break a contract is familiar.

Such extensions should be made carefully, however, as even persons with knowledge of outstanding contracts may fall into legitimate confusion about priorities. Moreover, the interests of creditors, who are not safeguarded by doctrines of good faith and lack of notice, should be carefully watched. Rules about retention of possession and delivery, for example, may take care of the worst imaginable cases; but, again, the history of equitable liens is a warning that unexpected preferences and priorities should be prevented.

Moreover, the practical justification for the application to land contracts of principles governing "equitable titles," is lacking in other classes of contracts. The land contract has become a useful informal means for the transfer of interests in real property, governed by rules analogous to the informal rules governing sales of chattels. The informal and practical sales law, for example, has no need of the superstructure of what is sometimes loosely called "equitable conversion."

Legislation extending the remedy of specific performance should take account of these considerations. At the same time, there seems to be no need to wait on legislation; and no reason why the courts themselves should not explicitly liberalize relief by specific performance, expressly holding that the consequences of "equitable conversion" do not follow. Such a tendency would recognize the underlying theory of contracts and expectation damages applied in damage actions. It could be developed in a workmanlike way by the judges themselves.*

*The second part of this article, dealing with limits upon promissory liability, will appear in the February issue.