court's administration of justice.[31] It seems clear that, under this standard, the petitioner's statements in the pleadings in the federal suit were not in contempt of the California court.[32]

Contracts—Formation—Promissory Estoppel in Business Transaction—[Federal].—At the request of the plaintiff, the defendant, a manufacturer of refrigeration equipment, supplied price and other data concerning machines which would be required by the plaintiff in bidding on an air-conditioning contract with the state. Although the defendant's letter said, "the tabulation includes two machines as listed," data were given for one machine only. At the bottom of the first page of the defendant's stationery was a statement in small red print to the effect that all contracts were subject to approval by an officer of the defendant and that quotations were subject to change without notice.

The plaintiff submitted a bid accompanied by a bond, basing his figures upon the price given by the defendant, which the plaintiff understood to cover two machines. After the award of the contract to the plaintiff, he learned from a competing contractor that the price quoted was intended as a per unit price only. The competitor, who had received a copy of the same quotation sent to the plaintiff, had questioned the defendant before the opening of the bids and had warned the defendant of the possible ambiguity.[1] Thereupon the plaintiff mailed a formal acceptance to the defendant. After the defendant's refusal to supply two machines at the price understood by the plaintiff, the plaintiff obtained machines elsewhere. The plaintiff sued in an Illinois court, alleging that the defendant's letter was an offer to supply two machines at the price indicated and that either the plaintiff's written acceptance was effective or the defendant was bound by promissory estoppel from the time the plaintiff, by entering into a contract with the state specifying the defendant's equipment, had changed its position in reliance on the statement.

The federal district court, to which the case was removed, decided for the plaintiff

[31] See Holmes, J., dissenting in Toledo Newspaper Co. v. United States, 247 U.S. 402, 423 (1918). See also Freedom of Expression v. Contempt of Court, 9 U.S. L. Week 3110, 3111 (1940) where petitioner's counsel in his Supreme Court briefs in Bridges v. Superior Court suggests that it must be demonstrated that: 1) the judge knew of the publication while suit was pending, 2) there was intent to influence him, and 3) the acts were such as would influence a judge of "ordinary firmness and fortitude."

[32] An actual obstruction to the state court proceedings may possibly be found by asserting that the false charges supported the federal suit which itself delayed the state court action. Brief for Respondent, at 38–39. But that argument concedes the relevance of the allegations to the issues before the federal court and, therefore, their privileged character. Note 3 supra; cf. In re Riggsbee, 151 Fed. 701 (D.C.N.C. 1907) (federal court will not cite for contempt one who used its proceedings to obstruct the state court).

[1] The competing contractor warned the defendant over the telephone as soon as the quotation was received, which was Saturday, December 24. The defendant would have been able to clarify the letter by phoning the other three contractors to whom copies had been sent. But since December 25 and 26 were holidays, the defendant could not have been absolutely certain that another letter would have reached the plaintiff before it mailed its bid on December 27, for opening at 2:00 P.M. on December 28.

on both theories, with the additional comment that the defendant could not complain of the construction placed upon its words since it had notice that the words might be so interpreted and had failed to clarify them. On appeal to the circuit court of appeals, *held*, the quotation did not constitute an offer, and that in any event the plaintiff had not reasonably construed the defendant's terms. Moreover, even if the quotation were an offer, the plaintiff's knowledge of the mistake before mailing its written acceptance prevented the formation of a bilateral contract. The court indicated, however, that had it considered the quotation an offer whose terms had been reasonably construed and had irreparable detriment been shown, promissory estoppel would have rendered the defendant liable. Sparks, J., concurred specially, differing with the court in its disregard of the printed provision. *Robert Gordon, Inc. v. Ingersoll-Rand Co.*[2]

The decision rests primarily upon the view that the plaintiff had unreasonably interpreted the figures given in the quotation.[3] The court's method of dealing with the other aspects of the case, however, is of considerable significance. The few reported cases suggest that reliance upon a quotation similar to the one in the instant case may prove hazardous to the "middleman" contractor although ordinarily he may be protected by the desire of the supplier to preserve his good will and business reputation.[4] Consideration of his position has become of greater importance because of the increase in the number of government contracts and the present emphasis on subcontracting. The refusal of the court in the instant case to view the language of the quotation as promissory does not render that position more favorable; but the indication of the court's willingness to apply promissory estoppel in this type of case is of very considerable interest.

The court follows conventional strictness in interpreting as non-promissory the lan-

[2] 117 F. (2d) 654 (C.C.A. 7th 1941).

[3] In thus differing from the trial judge, the present court imputes a lack of reasonableness to two employees of the plaintiff and to a competing contractor, who had received the original of which the letter received by the plaintiff was a carbon copy. The competitor testified that he had at first understood the price to cover two machines but that his knowledge of the type of machines made by Ingersoll-Rand led him to call for clarification, at which time he warned the defendant and suggested that the other contractors be informed of the intended meaning. Letter of William Hoier, Transcript of Record 37; testimony of William Brayton, Transcript of Record 30, and of G. H. Dickerson, Transcript of Record 53–54. The court considers that the lowness of the figure $26,450 should have prevented the plaintiff from believing it applied to two machines, particularly since he had before him for comparison another company's quotation of $37,967 for the two machines. If this means that the plaintiff should have envisioned a standard in the neighborhood of the latter price he would seem to have as much reason to believe that a variation of $14,933 above that standard was absurdly high as to believe that a downward variation of $11,517 made the price "absurdly low."

[4] Particularly questionable is Ingalls Steel Products Co. v. Foster & Creighton Co., 226 Ala. 122, 145 So. 464 (1932), where the plaintiff construction contractor ordered steel in response to quotations of steel supplier which said, "proposal when accepted by buyer and approved in writing by an officer of seller . . . . becomes a contract in full force and binding on both parties." It was held, with two judges dissenting, that no contract was formed by a letter signed by the defendant's chief engineer which said, "attached is a formal acknowledgment of your order. . . . . We will ship accordingly." See Truscon Steel Products Co. v. Cooke, 98 F. (2d) 905 (C.C.A. 10th 1938) (defendant led contractor to believe steel would be shipped as soon as old balance was paid, then rejected order causing plaintiff to pay late penalties on building).

guage, "we tabulate below the vital information for making the necessary quotation. . . . ."[5] In distinguishing offers from mere solicitations or invitations to deal, courts have stressed the use of the word "offer" as well as the completeness of the terms expressed.[6] In the leading case of *Moulton v. Kershaw*[7] the court went so far as to refuse to construe as promissory a letter which read, in part, "we are authorized to offer Michigan fine salt . . . . [we] shall be pleased to receive your order." The letter did not, however, expressly limit the quantity which could be ordered.

Replies to questions put to a number of businessmen, for whom principally we must assume the commercial law is administered, suggest that the unwillingness of the court to treat the communication in *Moulton v. Kershaw* as an offer is inconsistent with business expectations.[8] The businessmen felt that the implied limitation to a reasonable amount dealt adequately with the problem of the quantities offered. Outside of the trades in which seasonal styles are a factor, all the buyers interviewed felt that they would have a right to recover for failure to deliver in this situation. This right was conceded by four out of five representatives of sellers.[9] It is submitted that words such as "we quote" or "tabulated herewith are our prices" may serve under proper circumstances to express an offer.[10]

[5] 117 F. (2d) 654, 656 (C.C.A. 7th 1941).

[6] Moulton v. Kershaw, 59 Wis. 316, 18 N.W. 172 (1884); Nebraska Seed Co. v. Harsh, 98 Neb. 89, 152 N.W. 310 (1915); Beaupré v. Pacific & Atlantic Tel. Co., 21 Minn. 155 (1874); Lincoln v. Erie Preserving Co., 132 Mass. 129 (1882); Smith v. Gowdy, 8 Allen (Mass.) 566 (1864).

[7] 59 Wis. 316, 18 N.W. 172 (1884).

[8] The questions were put by Mrs. Aaron Levy in 1939 to large salt manufacturers, manufacturers and wholesalers of lingerie and linen goods, and buyers in the largest Chicago department stores. Each businessman was read a statement of the facts of Moulton v. Kershaw. Sellers were asked these questions: "1) If you were to send one of your customers a letter exactly like that sent by Kershaw to Moulton what sort of response would you hope to elicit from him? 2) If you received an order exactly like Moulton's and refused to deliver the salt and withdrew your letter, would you feel that the other party had a right to recover? 3) Note you have specified no maximum quantity in your letter. What do you mean to indicate by this omission? 4) Would you feel that an order for 2,000 barrels of salt (translated into its value equivalent for other trades) was highly unreasonable, keeping in mind the fact that no maximum quantity is mentioned?"

[9] One cautious dissenter made the sound observation that without consulting a lawyer he would not consider that the buyer had a right to recover.

[10] The following, from the files of a large Chicago department store, were considered to be firm offers by the buyer who received them: "We are now prepared to sell . . . . at 50¢ per yard."; "I am enclosing clippings of the assortment I can offer you at 32½¢ per yard."; "Enclosed samples available for immediate shipment at . . . . ."; "We have decided to feature . . . . at $1.15 per yard." In no case was a maximum quantity mentioned although it was reported that there is an implied minimum of ten yards understood in the dry goods trade. Mrs. Levy's interviews, discussed in notes 8 and 9 supra.

Similar words were construed as offers in Fairmont Glass Works v. Grudden-Martin Woodenware Co., 106 Ky. 659, 51 S.W. 196 (1899) ("We quote for immediate acceptance"); Croshaw v. Pritchard, 16 T.L.R. 45 (Q.B. 1899) ("our estimate to carry out the work is"); College Mill v. Fidler, 58 S.W. 382 (Tenn. Ch. App. 1899) ("cannot sell for less than"). Cf. Rest., Contracts § 25, Illustration 2 (1932).

The plaintiff in the instant case did attempt to show a trade usage to treat such quotations as offers.[11] The court, feeling that the evidence did not show acceptance of the usage by both parties, avoided passing upon the defendant's contention that usage is available only to explain the terms of a contract, not to create one. The defendant's contention does not seem well-founded. Usage alone gives meaning to any of the words or other symbols from which a contract is spelled. It could hardly be maintained that no contract is formed by the signs used among traders in the grain pit or at an Irish horse fair, although such signs have meaning only by reference to the usage of those markets.[12] The dicta which are adduced to support the defendant's position are taken from cases which could better have been explained by the circumstance that the usage could not have been presumed to have been known to both parties.[13]

There could be no question, of course, that the defendant's letter would not constitute an offer if the provision printed in small red type at the bottom of the defendant's stationery were to be regarded as part of the message. This provision stated that all contracts were subject to approval by an officer of the defendant company and all quotations subject to change without notice. The majority of the court is in accord with the prevailing view that such printed provisions are to be given effect only when they are not repugnant to the writing and when they have come or "should" have come to the attention of the party to be bound.[14] The situation in which, as in the instant case, the printed clause is added as a general safety catch to stationery often used for purposes other than the formation of contracts should be distinguished from that in which the parties look to a printed form to supply the bulk of the agreement.[15] In the former case the printed provision should not, it is submitted, be presumed to have come to the attention of the parties unless it is referred to in the written text.[16] This view is supported not only by the general caveats as to the one-sidedness of printed

[11] 117 F. (2d) 654, 659 (C.C.A. 7th 1941).

[12] Consult Greene, Theories of Interpretation in the Law of Contracts, 6 Univ. Chi. L. Rev. 374 (1939).

[13] Compare Sterling-Midland Coal Co. v. Great Lakes Coal & Coke Co., 334 Ill. 281, 290, 165 N.E. 793, 796 (1929) with Tilley v. County of Cook, 103 U.S. 155 (1880) and Currie v. Syndicate, 104 Ill. App. 165 (1902).

[14] Summers v. Hibbard, Spencer, Bartlett & Co., 153 Ill. 102, 38 N.E. 899 (1894); Augusta Factory v. Mente & Co., 132 Ga. 503, 64 S.E. 553 (1909); Chicago v. Weir, 165 Ill. 582, 46 N.E. 725 (1897); Warner Construction Co. v. Lincoln Park Com'rs, 278 Ill. App. 42 (1934); Menz Lumber Co. v. McNeeley, 58 Wash. 223, 108 Pac. 621 (1910) (reasonableness for the jury); Sturm v. Boker, 150 U.S. 312 (1893); consult 8 Univ. Chi. L. Rev. 763 (1941) (effect of printed clauses on parking lot tickets); 1 Williston, Contracts § 90D (1936).

[15] Compare cases in note 14 supra with Waco Mill & Elevator Co. v. Allis-Chalmers Co., 49 Tex. Civ. App. 426, 109 S.W. 224 (1908); Constantian v. Mercedes-Benz, 5 Cal. (2d) 631, 55 P. (2d) 841 (1936).

[16] Summers v. Hibbard, Spencer, Bartlett & Co., 153 Ill. 102, 38 N.E. 899 (1894); Sturtevant Co. v. Fireproof Film Co., 216 N.Y. 199, 110 N.E. 440 (1915); Menz Lumber Co. v. McNeeley & Co., 58 Wash. 223, 108 Pac. 621 (1910) (whether parties should have noticed provision a jury question); Anaconda Copper v. Houston, 107 Ill. App. 183 (1903); cf. Rodesch v. Kirkpatrick Coal Co., 41 F. (2d) 519 (C.C.A. 6th 1930); Proel v. Brunswick-Balke-Collender Co., 216 N.Y. 310, 110 N.E. 619 (1915). But consult Rest., Contracts § 70, Illustration 4 (1932).

forms[17] but also by the tendency of this indiscriminate use to dull the attention of one concentrating upon the choice of the individualized text.[18]

Since it is generally thought that *James Baird Co. v. Gimbel Bros., Inc.*,[19] restricted the application of promissory estoppel to non-commercial cases,[20] the indicated willingness of the present court to apply this doctrine to commercial cases[21] may be of considerable significance.[22]

[17] Consult Llewellyn, Review of Prausnitz, The Standardization of Commercial Contracts in English and Continental Law, 52 Harv. L. Rev. 700 (1939); Llewellyn, Common Law Reform of Consideration: Are There Measures?, 41 Col. L. Rev. 863, 869 (1941).

[18] Even the device which is currently in vogue among businessmen of printing such escape clauses so that they will appear directly after the salutation in all their letters is subject to this objection, particularly where several such clauses constitute an involved paragraph. Like the boy who cried "Wolf!" too often, the users of these provisions can scarcely complain when their omnibus and usually inapplicable clauses cease to draw the attention of a busy reader. But cf. Rodesch v. Kirkpatrick Coal Co., 41 F. (2d) 519 (C.C.A. 6th 1930).

[19] 64 F. (2d) 344 (C.C.A. 2d 1933), noted in 28 Ill. L. Rev. 419 (1933) and 20 Va. L. Rev. 214 (1933).

[20] "Since the doctrine of promissory estoppel was held inapplicable to all commercial transactions, there was no necessity for the court to differentiate. . . . ." 28 Ill. L. Rev. 419, 420 (1933).

In the Baird case there was no doubt as to the promissory nature of the language used nor as to the fact that the defendant had made a mistake, but the defendant had telegraphed a revocation in time for the plaintiff to have withdrawn his bid although he would not have been able to submit another. Moreover, the defendant had expressly requested a prompt acceptance. Although it might be said that the opinion rests primarily upon this request for an acceptance, a statement that the attitude expressed is ungenerous toward the commercial application of promissory estoppel is also justified.

Compare Corbett v. Cronkhite, 239 Ill. 9, 87 N.E. 874 (1909) (expense of investigating title not sufficient consideration to enforce option under seal in equity); Dunshee v. Dunshee, 255 Ill. 296, 99 N.E. 593 (1912) (denial of specific performance of promise that land should go to tenant if he made a success of farming it); Campbell Investment Co. v. Taylor, 246 Ill. App. 433 (1927) (expenditure by offeree in arranging underwriting of remodeling will not cause promise to lease to be enforced); Comfort v. McCorkle, 149 Misc. 826, 268 N.Y. Supp. 192 (S. Ct. 1933), with Richelieu Hotel Co. v. Internat'l Military Encampment Co., 140 Ill. 248, 29 N.E. 1044 (1892) (incorporation subscription enforced because of money spent in preliminary organization); Lusk-Harbison-Jones, Inc. v. Universal Credit Co., 164 Miss. 693, 145 So. 623 (1933); Brewer v. Universal Credit Co., 192 So. 902 (Miss. 1940); Port Huron Machine Co. v. Wohlers, 207 Iowa 826, 221 N.W. 843 (1928); Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 Atl. 71 (1932) rev'd on other grounds, 318 Pa. 490, 178 Atl. 490 (1935); Pryor v. Cain, 25 Ill. 263 (1861) (subscriber to church liable at least for proportionate amount of expenditures made in reliance on his promise); Estate of Beatty v. Western College, 177 Ill. 280, 52 N.E. 432 (1898) (note enforced because of reliance in building college dormitory); cf. Estate of Switzer v. Gertenbach, 122 Ill. App. 26 (1905) (promise to will to stepson who had come to live with testator would be enforced); Martin v. Meles, 179 Mass. 114, 60 N.E. 397 (1901).

[21] 117 F. (2d) 654, 661 (C.C.A. 7th 1941).

[22] Requiring "irreparable detriment" as a condition of recovery may be more rigorous than the usual standard of substantial detriment when injustice cannot otherwise be avoided. Rest., Contracts § 90 (1932); 1 Williston, Contracts § 139 (1936). Either formulation would

Wider enforcement of promises has been advocated by many authorities;[23] business convenience as well as morals[24] have been said to favor such a trend.[25] Although it is conceded that the machinery of the law should not be set in motion lightly, Anglo-American law has been criticized for double-barring liability.[26] The present case suggests that the defendant can be adequately protected by means of the requirement of clear promissory language without resort to the additional safeguard of the consideration requirement.

The step which the present court indicates that it would be willing to take may be compared with the recent tendency toward refusing to permit revocation of offers for unilateral contracts after the offeree has begun performance.[27] An offer requesting a performance over a period is not strikingly different from the quotation in the instant case. While the quotation, if promissory at all, is perhaps better interpreted as contemplating a promise in return, it could well be interpreted as asking for the very act of bidding which the plaintiff performed.[28] Application of the promissory estoppel doctrine would, however, minimize the conceptual difficulties which beset those who attempt to explain the irrevocability of offers for unilateral contracts.[29]

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seem to be satisfied by the alternative which faces the plaintiff in the instant case. Although it is suggested that he might escape the possible loss of his $10,000 performance bond, the plaintiff faces a certainty of damage to his business reputation and of the loss of the opportunity to do a profitable job for the state.

[23] Shattuck, Gratuitous Promises—A New Writ?, 35 Mich. L. Rev. 908 (1937); Winfield, The American Restatement of the Law of Contracts, 11 J. Comp. Leg. & Int. Law 179 (1929); Cohen, The Basis of Contract, 46 Harv. L. Rev. 553 (1933); Pound, Law and Morals 40 (1924); Sharp, Pacta Sunt Servanda, 41 Col. L. Rev. 783 (1941).

[24] Whether conceived of as part of a larger philosophical scheme or merely as the prevailing sense of fitness of the average man—the mores.

[25] " 'It is right that a man keep all of his promises, but the law only compels him to keep those which are made for valuable consideration.' . . . . The answer to Historicus is that for a generation the courts have been quietly loading his typical unmoral legal rule with exceptions. . . . ." Pound, Law and Morals 40–41 (1924). Consult Sharp, op. cit. supra note 23, at 783, 784 nn. 3, 6.

[26] Sharp, op. cit. supra note 23, at 796.

[27] Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 Pac. 1086 (1902); Crook v. Cowan, 64 N.C. 743 (1870); Zwolanek v. Baker, 150 Wis. 517, 137 N.W. 769 (1912); Braniff v. Baier, 101 Kan. 117, 165 Pac. 816 (1917); Watchel v. Nat'l Alfalfa Journal Co., 190 Iowa 1293, 176 N.W. 801 (1920) (prize contest); Jones v. Hollander, 3 N.J. Misc. 973, 130 Atl. 451 (S. Ct. 1925); Reuss v. Baron, 10 P. (2d) 518 (Cal. App. 1932), rev'd on other grounds, 217 Cal. 83, 17 P. (2d) 119 (1932); Werner Sawmill Co. v. Vinson & Bolton, 220 Ala. 210, 124 So. 420 (1929). Contra: Petterson v. Pattberg, 248 N.Y. 86, 161 N.E. 428 (1928); Chapman v. Merchants Trust Co., 184 Minn. 467, 239 N.W. 231 (1931); Auerbach v. Internationale Lampen Gesellschaft, 177 Fed. 458 (C.C. N.Y. 1910); Campbell Investment Co. v. Taylor, 246 Ill. App. 433 (1927); Alexander Hamilton Institute v. Jones, 234 Ill. App. 444 (1924).

[28] Cf. Plumb v. Campbell, 129 Ill. 101, 18 N.E. 790 (1888), where it was said that an offer would be accepted by "beginning performance in a way which would bind him [offeree] to complete it."

[29] "The question of whether such an offer becomes irrevocable upon the offeree undertaking performance . . . . is one which has not so much troubled the courts as it has the law writers

Quite apart from any promissory nature as an undertaking for the future, the words of a quotation such as that in the instant case may be regarded as a mere statement of the current price as a present fact, stripped of any commitments. Considering the quotation in this light, the liability of the seller in this situation might be expressed in terms of tort liability for negligent misstatement.

The existence and the extent of this liability have been the subject of much discussion,[30] with insufficient case authority to set bounds to the range of the debate. The business quotation in the situation presented in the instant case seems to satisfy such criteria as have been established, and it does not run afoul of any of the limitations imposed by precedent.[31] The seller who makes the quotation should be under a duty to give the correct information since he knows that it is required for a serious purpose, that the contractor who receives the quotation intends to rely upon it, and that he will be financially injured if the information is not accurate. And while it would beg the question to say that the contractor has a legal right so to rely, it would seem that "in morals and good conscience" he does have a right so to rely.[32] In the case under consideration, the seller is the only source of the information, and he promoted his own opportunity to make a profitable sale by giving the information. The danger which was feared in *Ultramares v. Touche*,[33] of liability in a limitless amount, for an indefinite period and to an unascertained number, is not present in this situation.[34]

Treating erroneous business quotations under a tort theory as negligent misstatement presents several advantages. The contractor injured as a result of the error of the quoting supplier would not find his recovery jeopardized by the strict requirements of promissory language insisted upon even in the enlightened doctrine of promissory estoppel espoused in the instant case. Nor would the apportionment of liability in

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and commentators." Reuss v. Baron, 10 P. (2d) 518, 519 (Cal. App. 1932), rev'd on other grounds, 217 Cal. 83, 17 P. (2d) 119 (1932).

[30] Smith, Liability for Negligent Language, 14 Harv. L. Rev. 184 (1900); Williston, Liability for Honest Misrepresentation, 24 Harv. L. Rev. 415 (1911); Bohlen, Misrepresentation as Deceit, Negligence or Warranty, 42 Harv. L. Rev. 733 (1929).

[31] Compare Internat'l Products Co. v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662 (1927); Glanzer v. Shepard, 233 N.Y. 236, 135 N.E. 275 (1922); Mulroy v. Wright, 185 Minn. 84, 240 N.W. 116 (1931); Bush Terminal Co. v. Globe & Rutgers Fire Ins. Co., 182 App. Div. 748, 169 N.Y. Supp. 734 (1918), aff'd 228 N.Y. 575, 127 N.E. 909 (1920), with Nat'l Iron & Steel Co. v. Hunt, 312 Ill. 245, 143 N.E. 833 (1924); Courteen Seed v. Hong Kong & Shanghai Bank, 245 N.Y. 377, 157 N.E. 272 (1927); Jaillet v. Cashman, 115 Misc. 383, 189 N.Y. Supp. 743 (S. Ct. 1921); cf. also Ultramares v. Touche, 255 N.Y. 170, 174 N.E. 441 (1931); MacKown v. Illinois Printing & Pub. Co., 289 Ill. App. 59, 6 N.E. (2d) 526 (1937).

[32] These are the standards laid down by Andrews, J., in Internat'l Products Co. v. Erie R. Co., 244 N.Y. 331, 155 N.E. 662 (1927).

[33] 255 N.Y. 170, 174 N.E. 441 (1931).

[34] The quotation in the instant case was addressed to four heating contractors, only one of whom could secure the job and suffer damage from the defendant's mistake. Liability could be limited to the amount of the error and to the period of performance set in the specifications, of which the defendant had knowledge.

accordance with fault become involved in the confused state of the law of mistake in contracts.[35]

On the other hand, the negligent misstatement doctrine could be applied so as normally to limit the seller's liability to the difference between the price quoted and the price existing at the time. Under a contract approach, the seller, if liable at all, would be liable for the entire amount of the mitigated damages suffered by the contractor.[36] In this would be included the amount of the market rise between the time of the quotation and the time for performance. The seller's liability for negligent misstatement is only for such damages as he could reasonably have foreseen as a result of his act. He can well say that the only damages he could have foreseen were that the contractor would act upon the price as stated instead of the price as it actually was; but that he could reasonably expect that, if a contractor wished to get the machines at the present market price at some future date, the contractor would enter into contract relations with him. The seller, in other words, does not underwrite the market, under the negligent misstatement theory.

In appropriate cases, of which the instant one may be an example, the defense of contributory negligence would be available.[37] Finally, the comparative negligence doctrine of some jurisdictions would perhaps afford an opportunity for sharing the loss in accordance with the relative fault of the parties.[38] While no case of negligent misstatement seems to have arisen under the comparative negligence statutes, there appears to be nothing in the doctrine of comparative negligence to prevent its application to this type of case.[39] Although some such system of apportioning the loss commends itself

[35] Foulke, Mistake in Formation and Performance of Contracts, 11 Col. L. Rev. 197, 299 (1911); Some Aspects of the Law of Mistake in Illinois, 5 Univ. Chi. L. Rev. 446 (1938); Consequences Arising from Mistake in Transmission of a Telegraphic Offer for the Sale of Goods, 27 Yale L. J. 932 (1918).

[36] Consult Fuller and Perdue, Reliance Interest in Contract Damages, 46 Yale L. J. 52, 373 (1936).

[37] Williston, however, favors treating negligent misstatements as deceit, in order to deprive one who has spoken falsely (albeit from negligence) of the defense of contributory negligence. Williston, op. cit. supra note 30, at 437. But see Internat'l Products Co. v. Erie R. Co., 244 N.Y. 331, 339, 155 N.E. 662, 664 (1927).

[38] Consult Gregory, Legislative Loss Distribution in Negligence Actions (1936); Mole and Wilson, A Study of Comparative Negligence, 17 Cornell L. Q. 333, 604 (1932); Sprague, Divided Damages, 6 N.Y.U. L. Rev. 15 (1928) (marine torts in admiralty); Campbell, Ten Years of Comparative Negligence, [1941] Wis. L. Rev. 289.

[39] Where comparative negligence statutes speak in terms of "injury to person or property" perhaps tangible injury alone is contemplated. Miss. Code Ann. §§ 511, 512 (1930); Neb. Comp. Stat. § 20-1151 (1929); Wis. Stat. § 331-45 (1939). But the Canadian statutes and the statute proposed by Professor Gregory carry no such qualifications. Ont. Rev. Stat. c. 115 (1937); Brit. Col. Rev. Stat. c. 52 (1936); New Bruns. Rev. Stat. c. 143, p. 1758 (1927); Nova Scotia Stat. c. 3 (1926); Gregory, op. cit. supra note 38, at 154. As to the scope of the admiralty doctrine, consult The Max Morris v. Curry, 137 U.S. 1, 15 (1890); Sprague, op. cit. supra note 38, at 31; Mole and Wilson, op. cit. supra note 38, at 339; Telsey, English Apportionment of Blame in Collisions at Sea, 15 Tulane L. Rev. 567 (1941).

to the common sense of justice and is widely used in out-of-court settlements,[40] there are, as yet, no techniques in contract law by which the court can achieve this result.

Evidence—Testimonial Recollection—Present Recollection of Past Recollection Recorded in Memorandum Now Lost—[Federal].—The plaintiff intervened in a corporate receivership proceeding, claiming to be the owner of 10,126 shares of lost stock. Although he remembered purchasing the stock, he admitted that he had no present recollection as to the number of shares. He testified, however, that two years previous to his original petition to intervene he had seen a memorandum, written by him shortly after the stock transactions, which stated the number of shares purchased. The memorandum had since been lost or stolen, but the plaintiff recalled its contents and was thus able to testify as to the amount of stock he had bought. He also testified concerning his habits in the writing of such memoranda and asserted that when he saw this particular memorandum he had recognized his handwriting and had known the memorandum to be correct. Upon appeal from a disallowance of the plaintiff's claim, *held*, that the past recollection recorded, reflected in the memorandum, was sufficient to sustain the validity of the claim. *Putnam v. Moore*.[1]

The opinions of both the district court and the circuit court of appeals are indicative of the confusion prevalent in regard to the introduction of memoranda into evidence. The lower court refused to admit the testimony of the plaintiff on the ground that he had no independent recollection which the memorandum might serve to revive. Doubtless influenced by the plaintiff's brief on appeal, which took pains to establish the rule of past recollection recorded in the absence of present memory, the circuit court of appeals allowed introduction of the evidence without considering the fact that no memorandum had in fact been introduced.

The principal case thus presents the problem of the admissibility of oral testimony offered to prove the existence and contents of a past recording of recollection, which writing, if available, would be admissible evidence bearing on the ultimate question at issue. Substantially the same question was involved in the early case of *Pidgeon v. Williams' Administrators*.[2] It was there held not to be error to admit oral evidence by a bank officer regarding an entry he had made on a bank record or "scratcher" indicating the account to which a deposit should be credited. But since that decision did not analyze the question at any length, the principal case presents the first real opportunity for analytical discussion. Such a case, moreover, has been anticipated, with trepidation by some and with acquiescence by others.[3]

[40] This is particularly true among organizations whose inter-connections are more intimate than those depending merely on contract. In view of the close questions involved in the instant case, the usual efforts at settlement would be a normal incident of the progress of litigation. We are informed that the lower court attempted such a solution during the trial of the instant case, but it was rejected by the defendant. May there not be cases where splitting the loss may be achieved under the authority of the court, somewhat as in admiralty?

[1] 119 F. (2d) 246 (C.C.A. 5th 1941).

[2] 21 Gratt. (Va.) 251 (1871).

[3] Morgan, Hearsay and Preserved Memory, 40 Harv. L. Rev. 712, 721 (1927); Bannister, Recollection on the Witness Stand, 15 Wash. L. Rev. 257, 260–61 (1940).