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CONTRACTS IN IOWA REVISITED — 1966

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Ten prior articles attempted a collection and commentary on various aspects of Iowa contract law as reflected in cases decided since the publication of the volume *Iowa Annotations to the Restatement of Contracts*[1] in 1934 and prior to the publication of each individual article.[2] In the December 1962 issue of this Review a supplement was presented covering the first five articles.[3] In the December 1963 issue a continuation of the supplementation covered two additional articles of the original series and a few cases in areas of the first five articles.[4] In May, 1964, the remaining three articles of the original series were supplemented.[5] Subsequent judicial output, and enactment of the Uniform Commercial Code (hereinafter referred to as UCC) in Iowa to be effective July 4, 1966,[6] are the stimuli for this supplement intended to cover all the original ten subject areas.

The introduction of the UCC brings a greater degree of codification to some of the traditional contracts subjects. There will be no attempt here to be exhaustive of all the sections of the UCC having some connection with the subject areas. However, an attempt will be made, without warranty of completeness, to include those sections having direct impact on the material included in prior articles.[7] Subsequent references in this article to sections of UCC will be, for example, as section 2-104 and not as section 554.2104 as directed in the Iowa version,[8] to emphasize the article of the Code involved; in this example, Article 2 concerning Sales of Goods.

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[1] This volume is hereinafter referred to as IOWA ANNOTATIONS, and RESTATEMENT, CONTRACTS (1932) is referred as a RESTATEMENT. Standard treatises are referred to simply as WILLISTON and CORBIN. WILLISTON §§ 1-1011 will be referring to the third edition (1957-64); other sections refer to the revised edition (1936-38). CORBIN sections are from original volumes 2 (1950) and 4 (1951) and replacement volumes 1 and 1A (1963), 3 and 3A (1960), 5 and 5A (1964), and 6 and 6A (1962).

[2] *Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties*, 5 DRAKE L. REV. 3 (1955); *Doctrine of Consideration in Iowa Revisited—The Bargain Element*, 5 DRAKE L. REV. 67 (1956); *Contracts in Iowa Revisited—Third Party Beneficiaries and Assignments*, 6 DRAKE L. REV. 3 (1956); *Contracts in Iowa Revisited—Statute of Frauds*, 6 DRAKE L. REV. 63 (1957); *Contracts in Iowa Revisited—Mistake*, 7 (2) DRAKE L. REV. 3 (1958); *Contracts in Iowa Revisited—Illegality*, 8 DRAKE L. REV. 3 (1958); *Contracts in Iowa Revisited—Offer and Acceptance*, 8 DRAKE L. REV. 91 (1959); *Contracts in Iowa Revisited—Fraud and Misrepresentation, Duress and Undue Influence*, 9 DRAKE L. REV. 3 (1959); *Contracts in Iowa Revisited—Performance, Breach and Remedies*, 9 DRAKE L. REV. 66 (1960); *Contracts in Iowa Revisited—Scope and Meaning of Contracts*, 10 DRAKE L. REV. 87 (1961).

[3] *Contracts in Iowa Revisited—1955-1962*, 12 DRAKE L. REV. 41 (1962).

[4] *Contracts in Iowa Revisited—1958-1963*, 13 DRAKE L. REV. 3 (1963).

[5] *Contracts in Iowa Revisited—1959-1964*, 13 DRAKE L. REV. 131 (1964).

[6] Ch. 413, Laws 61st G.A., Iowa, 1965.

[7] Among the many articles see, for example Tisdale, *Impact of the Uniform Commercial Code on the Law of Contracts*, 39 N.D.L. REV. 7. (1963); Hawkland, *Major Changes under the Code in Sales Contracts*, 10 PRACT. LAW. 73 (1964).

[8] Ch. 413 § 10155 Laws 61st G.A., Iowa, 1965.

In connection with the use of the UCC there are several essential points to be made. In spite of the comprehensive nature of the UCC it is still only a partial codification. In the words of the preamble, it relates to:

> certain commercial transactions in or regarding personal property and contracts and other documents concerning them, including sales, commercial paper, bank deposits, and collections, letters of credit, bulk transfers, warehouse receipts, bills of lading, other documents of title, investment securities, and secured transactions, including certain sales of accounts, chattel paper and contract rights.

Without attempting to delineate the boundaries of the UCC, scanning of the preamble indicates at least that this is not a general code on contract law applicable to all subject matter such as service contracts and land contracts. It should further be noted, along the same line, that all of the provisions in the Code are not applicable to all the transactions covered. Article 1 of the Code contains definitions and rules applicable to the entire Code. However, each other article has its own definitions and rules applicable to its own article, Article 2 - Sales of Goods, Article 3 - Commercial Paper, Article 4 - Bank Deposits and Collections, Article 5 - Letters of Credit, Article 6 - Bulk Transfers, Article 7 - Documents of Title, Article 8 - Investment Securities, Article 9 - Secured Transactions, Article 10 - Effective Date and Repealer. Further, the Code itself recognizes there may be gaps because it provides in section 1-103 that:

> Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

Attention, in connection with the problem of interpretation, is also invited to the fact that section captions are a part of the Act,[9] but that the Comments, accompanying the Official Text, published by the sponsoring organizations, do not have the status of a state official legislative document, as a committee report, for the purpose of determining that elusive legislative intent sometimes referred to.

1. Doctrine of Consideration in Iowa Revisited—Discharge or Modification of Duties.[10]

Several sections of the UCC further weaken the traditional requirement of consideration in connection with discharge or modification of duties. Section 1-107 states that: "Any claim or right arising out of an alleged breach can be discharged in whole or in part without consideration by a written waiver or renunciation signed and delivered by the aggrieved party." There are no UCC definitions of consideration, waiver or renunciation; for instance, there is no indication whether reliance (promissory estoppel) would be consideration as well as "bargained-for-in-exchange" considera-

[9] UCC § 1-109, thus requiring a complementary amendment to § 3.3, IOWA CODE, 1962, which provides that head notes are not a part of the law. Ch. 413, § 10105, Laws 61st G.A., Iowa, 1965.

[10] 5 DRAKE L. REV. 3 (1955), supplemented in 12 DRAKE L. REV. 41 (1962). See also Note, *Principles Underlying Modification of Contracts in Iowa*, 44 IOWA L. REV. 693 (1959).

[11] Miller v. Lawlor, 245 Iowa 1144, N.W.2d 267 (1954), adopting theory of promissory estoppel in enforcing a negative easement of view on the basis of reliance, referred to it as a recognized specie of consideration, but the RESTATEMENT OF CONTRACTS treats consideration and reliance theories as separate. See 5 DRAKE L. REV. 67, 76 (1956).

tion.[11] In any event, however, this section does not go as far as the Iowa Court did in *Pond v. Anderson*,[12] where it allowed a real estate broker's claim to commission to be discharged by an oral waiver without consideration. It is suggested that the *Pond v. Anderson* position (oral waiver without consideration) should not be applicable to areas covered by the UCC. As indicated above, section 1-103 of the UCC does state that unless displaced by the particular provisions of the Act the principles of law and equity shall supplement its provisions. Although section 1-107 only states affirmatively that consideration is not needed for written waiver and does not affirmatively state consideration, or some substitute as reliance (promissory estoppel), is required in all other cases of discharge, this result is compelled by the sense of the section which is that where there is no consideration in cases of waiver or renunciation some protection against hasty action is indicated. Accordingly the *Pond v. Anderson* position must be considered to have been "displaced" as far as transactions under the Code are concerned.

Modification of contracts has often been ineffective for lack of consideration because of the common objection that there was either only a performance of an existing duty or only a receipt of what the party was otherwise entitled to. The Iowa court had made great inroads on this doctrine by supporting a modification of a mutually executory contract on the theory it was a rescission, without inquiring if there was, for instance, anything to be performed under the modified agreement except what had already been promised.[13] The UCC goes further and states in section 2-209 that: "(1) An agreement modifying a contract within this Article needs no consideration to be binding." There is no stated requirement of a writing except in sub-section 2-209(2) that a signed agreement which excludes modification except by a signed writing (except as between merchants, such a requirement, on a form supplied by a merchant, must be separately signed by the other party) cannot be otherwise modified and 2-209(3) that the requirement of the Statute of Frauds must be satisfied if the contract as modified is within its provisions. Sub-section 2-209(4), which states that an attempt at

[12] 241 Iowa 1038, 44 N.W.2d 372 (1950), discussed and criticized in 5 DRAKE L. REV. 3, 13 (1955). The statement in *Pond v. Anderson* that waiver is not a contract and that consideration is not essential to a waiver was, in words, reaffirmed in Continental Casualty Co. v. Kenney Co., ... Iowa ....., 140 N.W.2d 129 (1966), an action to recover on the promise of indemnity, contained in a tenant's lease promise to keep the sidewalks free from dangerous substances and to hold the landlord harmless for any damage due to tenant's neglect to do so, after landlord was compelled to pay a claim from a fall on an icy patch on the sidewalk. The defense was waiver and estoppel, upheld by a jury, in the conduct over a period of several years by the landlord in taking over control of the sildewalk including installing heating system of pipes and cleaning, without a request to the tenant to do anything. The Court affirmed a finding by the jury for defendant on the basis of conduct, as manifesting intentional relinquishment of a known right. Reaffirmation of *Pond v. Anderson* seems unnecessary in view of the fact that there was no reliance present in that case where there is reliance present here. The only thing in common is the absense of "bargained-for consideration."

[13] 5 DRAKE L. REV. 3, 6 (1959). This may be the explanation, although not so stated, for the holding in Central Ready Mix Co. v. John G. Ruhlin Const. Co., ... Iowa ....., 139 N.W.2d 444 (1966), that a claim of a materialman should be allowed at a subsequent smaller quantity discount than originally promised. There is no refernce to the consideration problem and simply a statement that "The right to modify a written contract by a subsequent oral one is well established," 139 N.W.2d at 447, which reads more like the proposition that the Parol Evidence Rule is no objection to a subsequent oral modification of an earlier written one. 10 DRAKE L. REV. 87, 88 (1961).

modification which does not meet the requirements of 2-209(2) and (3) can operate as a waiver, does not affirmatively require a writing, or consideration, but such a requirement may follow from treating the waiver referred to as the same as that in section 1-107 referred to above, requiring a writing or consideration.[14] However, it should be noted that section 1-107 refers to claims arising out of an alleged breach which would only partially, in literal words, overlap the phrase "agreement modifying a contract." Also 2-209 (5), which states that a party who has made a waiver affecting an executory portion of the contract may retract the waiver by reasonable notification unless retraction would be unjust in view of a material change of position in reliance on the waiver, suggests that only reliance, and not a writing or consideration are needed.

To be mentioned elsewhere[15] but noted here is that, although the requirement of consideration is somewhat weakened, there are two other provisions of the UCC that may fill the function previously performed by the doctrine of consideration. Section 1-203 states that: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." Also there is the provision in Section 2-302 authorizing a court as a matter of law to refuse to enforce a contract if a clause or the contract is unconscionable.

The requirement of consideration is probably not removed in contracts for the sales of goods in the type of case illustrated in *Olson v. Wilson & Co.*,[16] where the debtor offered a check marked "in full payment" of an asserted claim for cattle sold, and the creditor protested but later cashed the check. In a suit for additional money as allegedly promised, the court held for the debtor, finding consideration, and treated the action of the creditor as an acceptance under the theory that a person will be deemed to have accepted property offered upon the terms upon which it is offered where there is an opportunity to accept and reject, even though the terms are protested. This contract by legal implication does not seem to come within the provisions of either section 1-107 or 2-207; therefore consideration, however defined, would seem clearly to still be required there. Section 1-107 refers to waiver or renunciation, which, although not defined in the UCC, would seem to carry the notion of intention in fact to give up rights.[17] Section

[14] Hawkland, A TRANSACTIONAL GUIDE TO THE UNIFORM COMMERCIAL CODE § 1.26, p. 162 (1964-ALI-ABA Joint Committee on Continuing Legal Education); contrast this with the commentary attributed to the former professor Edwin Patterson in NEW YORK LAW REVISION COMM. REP. ON UCC 647 (1955). The comments accompanying 1-107 of the Official Text with Comments, submitted by the sponsoring organizations, the ALI and National Conference of Commissioners on Uniform State Laws, states: "There may, of course, also be an oral renunciation or waiver sustained by consideration but subject to Statute of Frauds provisions and to the section of Article 2 dealing with the modification of signed writings (Section 2-209). As is made express in the latter section, this Act fully recognizes the effectiveness of waiver and estoppel."

[15] See *infra* text accompaniying notes 77 et. seq.

[16] 244 Iowa 895, 58 N.W.2d. 381 (1953), discussed in 5 DRAKE L. REV. 3, 9 (1955) and 8 DRAKE L. REV. 91, 104 (1959).

[17] See definition of waiver in *Pond v. Anderson, supra*, n. 12. See also definition in Axtell v. Harbert, 256 Iowa 867, 129 N.W.2d 637 (1964), where the Court held there was neither estoppel nor waiver barring a brother's claim to land willed to him, where his advice to a sister that she could occupy such land was given when the sister made a promise, which was never fulfilled that she would have her husband execute a deed to another piece of property in which the brother was interested.

2-209 dispenses with consideration in case of "an agreement modifying a contract." Agreement is defined in section 1-201 (3) to mean "the bargain of the parties in fact as found in their language or by implication from other circumstances." The situation in *Olson* is clearly not a "bargain in fact." Contract is separately defined in 1-201 (11): "Contract means the total legal obligation which results from the parties' agreement as affected by this Act and any other applicable rules of law."

Unenforceability of a claimed accord and satisfaction, because of a claimed principal-agent, fiduciary relationship, was urged in a recent case, *Mayrath Company v. Helgeson*,[18] and rejected by the Court. After termination of a "Consignment Distributor Agreement", the dealer sent to an official of the credit company a letter stating differences in the claimed accounts and tendered a check "in complete settlement of our account with you." The check was deposited and apparently no protest was made until after the lawsuit was started. The Court, after announcing approval of a proposition that there be no valid accord and satisfaction because of lack of consideration and because there is no unliquidated claim to be compromised, where it appears that the relationship between the parties is that of principal and agent whereby the funds collected by the agent belong to the principal, affirmed a conclusion that this was a debtor-creditor relationship, and not simply one of principal-agent in spite of retention of title to goods by the manufacturer whose dealer had an obligation to pay for all the goods leaving a warehouse even though not collected by the dealer.

2. Doctrine of Consideration in Iowa Revisited—The Bargain Element.[19]

The requirement for consideration is further weakened by the provision in section 3-408, applicable to negotiable instruments, that:

> Want or failure of consideration is a defense as against any person not having the rights of a holder in due course (Section 3-305), except that no consideration is necessary for an instrument or obligation thereon given in payment of or as security for an antecedent obligation of any kind.

This should insure enforceability of promises made on negotiable instruments for no more reason than the existence of a party's own, or a third party's existing obligation, and promises made for more or less than a previously liquidated obligation of anyone.[20] The provisions of section 3-307 (3) that: "When signatures are admitted or established, production of the instrument entitles a holder to recover on it unless the defendant establishes a defense," should eliminate the notions sometimes referred to under a prior section that it was sufficient for the defendant to merely "go forward" with the evidence.[21]

Controversy continues over the case where there is an allegation of a promise of "permanent" relationship as a distributor of goods, or of employment, a promise of permanency allegedly either made explicitly or argued to follow implicitly from the fact no definite time is stated. When the

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[18] ..... Iowa ....., 139 N.W.2d 303 (1966).

[19] 5 DRAKE L. REV. 67 (1956), supplemented in 12 DRAKE L. REV. 41, 43 (1962) and 13 DRAKE L. REV. 3 (1963).

[20] See 5 DRAKE L. REV. 67, 70 (1956) and IOWA ANNOTATIONS § 75 III-C, 1,a,b,2,a,b, and § 84-V.

[21] 5 DRAKE L. REV. 67, 69 (1956) n. 5g and cases cited.

relationship later "sours", the distributor or employee many times screams, complaining about all the expense and trouble he has suffered, and asks for reimbursement for these expenses and even for future profits. Objections to maintenance of an action for an alleged breach of such a promise of permanent employment or distributorship may be a mixture of several ideas. One argument may be simply that, as a matter of interpretation, "permanent" does not mean permanent but means terminable at will, because the court refuses to believe anybody would so promise. Another argument has been that there is no consideration for such a promise even if made, because the distributor or employee has made no promises, or that any promise made is illusory, thus authorizing termination at any time by the employee or distributor. This has sometimes been accompanied by a declaration of lack of mutuality where the only requirement should be that of consideration, which does not necessarily require a promise as consideration. Frequently mentioned here is a requirement of consideration in addition to that of services to be rendered, a requirement of double consideration. Then the question is raised if elements of reliance, not bargained for, may meet these requirements. Another argument is that, even if a specific explicit promise of permanent employment or distributorship is proved, and even if a stated requirement of something other than the making of the promise is met for enforceability, as consideration (plus perhaps added consideration), there is no recovery because the damages claimed are too speculative. Prior articles have discussed the extent to which detrimental reliance (promissory estoppel) has been used to provide an answer in these cases. Several recent cases have not clearly answered whether detrimental reliance may be used to support enforceability of promises where the bargained-for consideration is in some respects considered to be deficient.

In *Hardin v. Eska Co.*[22] the Court affirmed a trial court judgment for the plaintiff for expenditures, in advertising, employing salesmen, and "otherwise", before the defendant allegedly broke a promise of an exclusive territory in the Greater St. Louis area for the direct retail sale to consumers of a product known as "Port-A-Temp", an electrical fan and cooling appliance. There was apparently no time indicated for duration of the arrangement and the plaintiff did not in terms promise to do anything; the defense was, in part, one of no consideration. Without extensive discussion, recovery of expenditures was justified essentially upon the authority of *Restatement of Contracts* section 90 (detrimental reliance-promissory estoppel), and *Atlas Brewing Co. v. Huffman,*[23] an early Iowa case. *E. I. DuPont de Nemours & Co. v. Claiborne-Reno Co.*[24] (a federal Court of Appeal case purporting to pass on Iowa law, refusing to enforce a promise of a distributorship for as long as the agent's services were satisfactory, because of lack of mutuality [no promise by the distributor] even in the presence of reliance by the building of facilities, etc.) and *Lewis v. Minnesota Mutual Life Insurance Company*[25] (refusing to enforce an alleged promise of permanent employ-

[22] 256 Iowa 371, 127 N.W.2d. 595 (1964), discussed in n. 64, 13 DRAKE L. REV. 131, 143 (1964), with relation to measure of damages and breach by prevention.
[23] 217 Iowa 1217, 252 N.W. 133 (1934).
[24] 64 F.2d 224, 89 A.L.R. 238 (8th Cir. 1933).
[25] 240 Iowa 1249, 37 N.W.2d 316 (1949), prior opinion in 35 N.W. 2d 51 (1948).

ment for the reason, among others, that there was not the needed additional consideration to services) were distinguished on the basis that they involved claims for future profits, with no discussion of why that factor was controlling or relevant. Is this a suggestion that no profits or expectation damages may be recovered where only detrimental reliance (promissory estoppel) is used as the reason for enforceability rather than bargained-for consideration? The *Claiborne-Reno* case was decided principally on the basis that the "fact that the promisee relies on the promise to his injury [in this case by building up facilities, developing territory, building up demand for these products, expending large sums] . . . does not establish consideration without the element of bargain or agreed exchange" and that "the entire trouble is found in the contract itself. It was not at its making strong enough to hold."[26] The Court, in *Lewis*, when confronted with the *Atlas* case, said merely that the lack of mutuality was not referred to in that case.[27] However, it should be noted that the *Atlas Brewing* case,[28] enforcing, at least for as long a time as until a reasonable notice of cancellation is given, a promise of distributorship to last as long as there was demand for the product, and as long as the distributor desired to continue with the same, was a case allowing recovery for profits.

Then along came *Des Moines Blue Ribbon Distributors, Inc. v. Drewrys Limited, U.S.A. Inc.*,[29] an action by a beer distributor against a brewery for damages from cancellation of a beer distributorship agreement in which a defense was lack of consideration for the alleged promise in the agreement to give exclusive rights to wholesale beer in a certain territory, to continue as long as there would be demand for the product and the distributor desired to continue with the sale of the same. The Court held that the distributor, whose agreement was cancelled without notice and apparently without cause, was entitled to recover damages from the brewery based on prospective margin on sales the distributor would have made during a period ending in a reasonable time after notice of termination, affirmed an instruction telling the jury it could consider the condition of and demand for the product, number of towns in territory, and affirmed a jury verdict based on evidence submitted as to a claim for approximately 12½ months after notice of termination with no requirement of expert evidence. The defense of lack of mutuality was met by the answer that mere lack of mutuality is not a defense where there is consideration and that in case of a sole distributorship for an indefinite time, if there is consideration other than services to be performed, the contract will continue for a reasonable time and may be terminated without cause only upon reasonable notice. The Court found additional consideration in the purchase [the Court also refers to an agreement to purchase, but this does not indicate any promise to purchase any specific amount in the original agreement] and payment for defendant's products, taking title, assuming the risk of destruction, maintaining warehouse facilities, keeping stock on hand, advertising, capital being tied in inventory and accounts receivable. The Court specifically said it was not

[26] 64 F.2d 224, 233 (8th Cir. 1933).
[27] 240 Iowa 1249, 1266, 37 N.W.2d 316, 326 (1948).
[28] 217 Iowa 1217, 252 N.W. 133, 135, 137 (1934).
[29] 256 Iowa 899, 129 N.W.2d 731 (1964).

passing on the argument that this agreement may be supported by application of the doctrine of promissory estoppel.

It should be noted that this is practically the same kind of case as *Claiborne-Reno, supra,* in which the federal court thought the promise unenforceable because the "contract . . . was not at its making strong enough to hold" in spite of an argument of building up facilities, etc. It is difficult to conclude that these activities are any more bargained-for-in-exchange consideration for the promise of a distributorship for an indefinite time in the *Blue Ribbon* case than the expenditures in *Hardin v. Eska Co.;* both seem supported by the theory of detrimental reliance (promissory estoppel).

Another exclusive distributorship case was *C. C. Hauff Hardware, Inc. v. Long Manufacturing Company,*[30] an action for damages for breach of an oral exclusive distributorship agreement for farm machinery, which was to continue indefinitely with no promise by the distributor of purchases of any definite amount, but with an "understanding" Hauff was to promote merchandise, get dealers and service them. Orders for machines and parts were placed and an amount was expended in promotion. After a period of slightly over a year the manufacturer defendant told Hauff it was terminating the prior agreement. Hauff sued for damages for breach by reason of termination without reasonable prior notice and claimed expenses of promotion, loss of profits (which claim was abandoned) and for the value of unusable stock in Hauff's possession. The trial court refused to find liability for termination of the agreement because any reasonable notice requirement meant only that the agreement was to continue for a reasonable length of time, which it had. The Supreme Court reversed, for retrial on the issue of just cause and evaluation of damages, stating that a distributorship agreement, where the distributor is to make purchases, develop a territory, and carry stock for an indefinite period, may not be terminated without notice or fault of the distributor, and that where there is no time limitation, the agreement is regarded as terminable by either party on reasonable notice, and that the reasonable time for continuation is not sufficient to avoid liability for termination, without giving notice, and reasonable time to adjust, citing the *Des Moines Blue Ribbon* case, and *Hardin v. Eska. Lewis v. Minnesota Mutual Life Insurance Co.,* refusing to support an alleged promise of permanent employment, was explained by stating that in that case there was a lack of mutuality amounting to a lack of consideration, that the distinction is that where one party is under obligation to make expenditures to develop a business, failure to do so would constitute a breach, so there is sufficient mutuality to sustain an enforceable contract. By way of comment, it is observed that the *Blue Ribbon* and *Hardin-Eska* cases do not appear to depend upon an argument of *obligation* or *promise* to make such expenditures.

In the face of this apparent desire to find an enforceable promise and to give legal significance to action, not all of which was bargained-for-in-exchange for the promise, but was more in the nature of detrimental reliance not bargained for, it is disturbing to note the Court's disregard of the reliance element in another case, *Hanson v. Central Show Printing Co.,*[31] an action for alleged breach of an agreement of "permanent" employment. Plaintiff was a

[30] ..... Iowa ....., 136 N.W.2d 276 (1965).
[31] 256 Iowa 1221, 130 N.W.2d 654 (1964).

skilled pressman in the employ of the defendant for many years until 1959, when, having an opportunity to obtain a steady job with another printing company in the same city, and knowing that defendant's business was often slack in the winter, he discussed with defendant as to steady work. The president of the defendant then sent plaintiff a letter in which was said: "Starting today Oct. 21 I will guarantee you 40 hours work per week thru out the entire year each year until you retire of your own choosing." Plaintiff elected to remain with the defendant and did so until October 1961 when he was discharged, apparently without cause. The hourly rate of pay was $2.77½. He asked damages in the past and in the future at the rate of $2.77½ per hour for 40 hours per week until he retires. At the close of evidence the trial court granted defendant's motion for a directed verdict. The Supreme Court affirmed, applying to these words the rule that a promise of permanent or life employment is no more than an indefinite general hiring terminable at the will of either party unless there is an express or implied stipulation as to duration or a good consideration additional to the services to be rendered, and that the giving up of an opportunity to take other employment is not sufficient as "additional consideration", citing as specific recent support *Lewis v. Minnesota Mutual* and Judge Graven's opinion in *Bixby v. Wilson & Company,*[48] in which emphasis was placed on the rule that there is a need for consideration in addition to the services to be rendered and that elements of detrimental reliance, and un-bargained-for elements such as leaving jobs, homes, etc., were not sufficient to justify enforcement of a promise of permanent employment. Continued insistence upon such a rule seems highly artificial and not consistent with the cases referred to above that were willing to give some relief or remedy, where there was no real mutuality by a promise as consideration, because of matters done in reliance on the promise, not always definitely bargained for. Apart from the question of whether precise case authority suggests this, promises should be enforced if there is sufficient evidence that such a promise was made, if such a promise is definite and certain enough so that a court may enforce it without indulging in too much speculation as to what the parties meant, and if there is some reason for enforcing the promise other than the fact it was made, such as consideration (of the bargained-for variety) or a detrimental reliance (called promissory estoppel by some), and if calculation of damages is possible, in view of the notion that there must be something other than mere speculation as a basis. It seems clear that a promise was made and that the promisee manifested consent by continuing work. Definiteness and certainty is fulfilled. In spite of the Court's attempt to equate the words with those of "permanent employment", "life employment" or those where no specific time is mentioned at all, the statement in the *Hanson* case seems very explicit, considering the words used, "I will guarantee you . . . until you retire of your own choosing". This is more than some general reference to life employment. As to a reason for enforcing the promise other than the fact that the promise is made, there is surely consideration present of the bargained-for sort, in the detriment of continuing to work, giving up the freedom not to work. If any consideration other than services is considered to be needed (such a requirement should be no more than trying to assure the court the parties really

[48] 196 F. Supp. 889 (N.D. Iowa 1961), discussed at 12 DRAKE L. REV. 41, 43 (1962).

meant what they said), there is no logical reason for limiting that to the bargained-for consideration variety. If detrimental reliance is sufficient to enforce promises in other situations why should it not as well furnish "added consideration" here? Giving up the possibility of a steady job would seem to be substantial and sufficient assurance that the parties meant what they said. Calculation of damages is difficult, but difficulty in this direction should not be allowed to completely eliminate enforceability. The injured party should be allowed to reach backwards from termination of the arrangement from the time of trial to prove such elements of loss already incurred as difference in wages earned, or other items of expenditures with evidence as to mitigation also to be introduced, even if it might be unduly speculative to allow other future wages or loss because it is too difficult to say how long he would work in the future as until retirement, or to say whether he would really lose any wages or he might get another job. Such a practice was followed in some of the above prior cases, where features of indefiniteness were present: as in *Hardin v. Eska Co.*, where there was an allowance for expenditures before termination, though there was no time stated at all for duration of the distributorship; as in *Des Moines Blue Ribbon v. Drewrys,* where an allowance for lost profits was permitted up to a "reasonable time" after termination of the distributorship where the duration of the agreement was apparently to be as long as there was demand for the product and the distributor desired to continue; and as in *Hauff Hardware,* where an allowance was made for promotional expenses and inventory of unusable equipment and parts under an agreement that had no time limit stated at all. The Court refused to apply in *Hanson* the "reasonable time" rule of the prior cases because "plaintiff neither pleads or contends for such a measure of damages" and "because there was adequate consideration in *Blue Ribbon* but such consideration is lacking here." The opinion does indicate a pleading for "damages" which should include whatever subsidiary elements are recoverable, even though the pleading was apparently for "damages in the past and future at the rate of $2.77½ per hour for 40 hours per week throughout the entire year for each year until he retires, all according to the terms of the employment contract" a broader claim than may perhaps be sustained. The reference to "no contention" suggests possibly an absence in the record of evidentiary support for any damages, although lack of reasonable access to the record does not permit confirmation of this. The reference to the lack of adequate consideration indicates that the real problem is not speculation as to damages but some conceived mechanical rule requiring additional consideration of the bargained-for variety. As indicated above that does not seem to be a reasonable position to take. At the time of prior commentary on *Bixby v. Wilson,* it was stated that the need for consideration in addition to services was of doubtful status in view of *Thompson v. Miller*[88] which, in connection with a claim for enforcement of an alleged promise of permanent employment, permitted the question to go to the jury as to the intent of the parties with the only statement of a rule being that for a contract for life to be upheld it must be in unequivocal terms without any statement of requirement of additional consideration. A motion for a new trial, granted by the trial court, was affirmed on the basis of discretion in the trial court to

[88] 251 Iowa 324, 100 N.W.2d 410 (1960).

conclude that damages were excessive considering the speculative nature. Now in this *Hanson* opinion the Court refers only to that portion of the *Thompson* opinion that states there was more than services, without reference to the fact that the principal thrust was to the unequivocal nature of the promise sufficient to go to jury, and the speculative nature of damages being some support for the trial court's granting of a new trial. In commentary upon the *Bixby* case this writer said:

> Therefore because of the above stated belief that the requirement of additional consideration has been removed as a mechanical requirement for enforcement of promises of permanent employment, and because of the belief that the Eighth Circuit [relied on in *Bixby v. Wilson* by Judge Graven as a reason for not using the general doctrine of detrimental reliance in enforcing the alleged promise of permanent employment as the necessary additional consideration although not bargained for or as reason enough for enforcement] was too severe in its statement of the requirement of promissory estoppel, this writer believes the Iowa Supreme Court would have held the detrimental reliance or promissory estoppel argument sufficient to enforce this promise in the *Bixby* case, contrary to Judge Graven's statement: 'It is the view of this court that the Iowa Supreme Court when presented with the situation here would probably hold the defendant was not liable to the plaintiff. The probability that it would so hold would seem to be greater than the probability it would not so hold.' However, now that Judge Graven has spoken it will probably be more difficult to convince the Iowa Court to the contrary.[84]

The latter sentence has been proved correct with the decision of the Iowa Court in the *Hanson* case. Interestingly enough, however, the Eighth Circuit cases, relied on by Judge Graven as the statement of Iowa law, refusing to accept the pervasive influence of detrimental reliance as the necessary additional consideration or reason by itself for enforcability, have been practically swept under the rug by the Iowa courts. These cases, all involving termination of exclusive distributorships, *DuPont v. Claiborne-Reno, supra,* and a series of cases denominated as *Meredith v. John Deere Plow Co. of Moline,*[85] refused to give legal significance to the allegation of substantial expenditures in reliance on the promise of the distributorship when there was no consideration in the original bargain, where the original bargain did not meet the test of mutuality. The recent Iowa cases referred to above, *Hardin-Eska, Des Moines Blue Ribbon* and *Hauff,* involving distributorships, all granted some kind of recovery for damages where the original agreement was probably subject to the defense of no consideration because of no mutuality, that is, the distributor had not promised really to do anything definitely recognizable, and where the distributor performed certain acts subsequently, probably not really bargained for as the exchange, although clearly within the scope of reasonable reliance.

Under this heading of "Bargain Element" have been discussed, in prior articles, the cases interpreting the provision of Iowa Code Section 614.11 that, "Causes of action founded on contract are revived by an admission in

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[84] 12 DRAKE L. REV. 41, 46 (1962).

[85] See 261 F.2d 121 (8th Cir. 1958) and other cases cited in n. 24, 12 DRAKE L. REV. 41, 45 (1962).

writing signed by the party to be charged, that the debt is unpaid or by a like new promise to pay the same."[36] In the prior article, this writer stated:

> Because of the apparent movement by such a result as in *Horn v. Anderson* [which refused to treat as a revivor words in a letter in which the debtor referred to a debt as unpaid although outlawed] taking the position of treating the admission required under the statute as one supporting the inference of a promise to pay, doubt is cast on the prior cases referred to above where there appeared to be a clear distinction between admissions on one side and promises on the other.[37]

A recent case, *Schroedl v. McTague*,[38] by referring to the cases referred to in the prior article, and following them, indicates that such an expressed doubt has not been realized. In this case, an action on a note, the defense of the statute of limitations was met by the plaintiff by offering copies of income tax returns for several years showing in attached schedules a notation of interest paid for the year as "Tony Schroedl $400.00". The stipulated interest on the $10,000 loan was four per cent. The Court held that it is not essential that the writing expressly admit the debt is unpaid and state the amount, but it is enough that an admission that debt is unpaid is the material and necessary inference from the writing, even though mere payment of interest is not enough. The indebtedness is then established by extrinsic evidence. Also the Court held that secondary evidence of a letter from one of the defendants was admissible for the purpose of establishing an admission even though they were deliberately destroyed by the plaintiff because they didn't keep letters. Lack of consideration to the wife, one of the defendants, because she received no money was also rejected.[39]

The proposition that giving up a claim in good faith is sufficient consideration for another promise was illustrated in *White v. Flood*,[40] in which the Court affirmed a judgment against defendant to pay plaintiff what he was to get in an earlier will and codicil (less inheritance tax) if he would not bring action to probate a prior will or to contest later ones; there is emphasis that it is not material on which side the right is ultimately found to be. In another case consideration was also found to support enforcement of a promise to divide up property of father contrary to terms of will, for assistance in obtaining commitment of a father to an institution.[41]

3. Contracts in Iowa Revisited—Third Party Beneficiary and Assignments[42]

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[36] A cause of action covering prior indebtedness may also be found in an account stated, effective to do more than toll the statute of limitations (revive a prior indebtedness) but also to make unnecessary proof of each prior item and also to preclude the jury from the determination of the reasonable value of individual items: In re Koch' Estates 256 Iowa 396, 127 N.W.2d 571 (1964).

[37] 5 DRAKE L. REV. 67, 74 (1956).

[38] 256 Iowa 772, 129 N.W.2d 19 (1964).

[39] Bjornsen Construction Co., 254 Iowa 888, 119 N.W.2d 801 (1963), 5 DRAKE L. REV. 67, 68 n. 5c (1956).

[40] ..... Iowa ....., 138 N.W.2d 863 (1965); 5 DRAKE L. REV. 67, n. 5a (1956) and IOWA ANNOTATIONS §§ 78-II-I, IV.

[41] In re Lindsey's Estate, 254 Iowa 699, 118 N.W.2d 598 (1962).

[42] 6 DRAKE L. REV. 3 (1956), supplemented in 12 DRAKE L. REV. 41, 47 (1962) and 13 DRAKE L. REV. 3, 6 (1963).

The UCC has a glancing reference to third party rights in section 2-318, captioned "Third Party Beneficiaries of Warranties Express or Implied", stating that:

> A seller's warranty whether express or implied extends to any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty. A seller may not exclude or limit the operation of this section.

Although the Comments state: "The section is neutral and is not intended to enlarge or restrict the developing case law or whether the seller's warranties given to his buyer, who resells, extend to other persons in the distributive chain", an argument may be made that the specification may lead to contraction of persons to whom liability may extend.

Only miscellaneous cases, with reference to third party beneficiary claims, were presented: an insured could not recover directly from a reinsurer;[43] an insurance company on a liability policy covering operation of swimming pool could not be joined in action for damages against insured;[44] a subcontractor could recover against the surety on a contractor's performance bond, the language in the bond as to agreement of contractor to purchase material and that subcontracts were part of contract being considered to indicate an intention it was for the benefit of the subcontractor as well;[45] United States was permitted to maintain an action directly against the surety bond of a warehouseman, because of a conclusion that the Iowa statute on the matter did not exclude the United States from action, especially considering the intent of the parties;[46] residuary beneficiaries under will could not bring action for breach of farm lease entered into between administrator and tenant, even though they might incidentally benefit by the lease, because they could do so only if the lease was expressly for their benefit which intent must clearly appear in the lease;[47] two of testator's ten children, not aware of agreement between other children to divide up the property of testator among all the children, contrary to provisions of will, could enforce such promise made for their benefit.[48]

In connection with assignments attention is invited to the impact of the UCC in the fact that, although "security interest" is generally defined in subsection 1-201 (37) to mean an "interest in personal property or fixtures which secures payment or performance of an obligation," it also states in the same subsection that: "The term also includes any interest of a buyer of accounts, chattel paper, or contract rights [defined in 9-105, 9-106] which is subject to article 9", and in 9-102 that "this Article applies so far as concerns any personal property and fixtures within the jurisdiction of the state . . . (b)

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[43] Winneshiek Mut. Ins. Assn. v. Roach, ... Iowa ....., 132 N.W.2d 436 (1965).

[44] Kester v. Travelers Indemnity Co. of Hartford Conn., ... Iowa ....., 136 N.W.2d 261 (1965).

[45] Westinghouse Electric Corp. v. Mill & Elevator Co., 254 Iowa 874, 118 N.W.2d 528 (1963).

[46] United States v. Tyler, 220 F. Supp. 386 (N.D. Iowa 1963) and United States v. Merchants Mut. Bonding Co., 220 F. Supp. 163 (N.D. Iowa 1963), differing with United States v. West View Grain Co., 189 F. Supp. 482 (N.D. Iowa 1960). See extensive commentary and criticism of the West View Case in CORBIN § 803, n. 555, § 804, n. 61.

[47] White v. Flood, ... Iowa ....., 138 N.W.2d 863 (1965).

[48] In re Lindsey's Estate, 254 Iowa 699, 118 N.W.2d 598 (1963).

to any sale of accounts, contract rights or chattel paper" with an exclusion stated in section 9-104 that: "This Article does not apply . . . (f) to a sale of accounts, contract rights or chattel paper as part of a sale of the business out of which they arose, or an assignment of accounts, contract rights or chattel paper which is for purpose of collection only, or a transfer of a contract right to an assignee who is also to do the performance under the contract". This will bring into play the remaining sections of Article 9 as to perfection, priorities, etc., and render inapplicable certain former filing provisions as to assignments of accounts, commented about in a prior article in the Review.[49] Sections 539.7-15 of the Iowa Code, on assignments of accounts receivable, commented on in the prior article, have been repealed by the enactment of the UCC,[50] but sections 539.1, 2, and 3, about assignments, were amended only by adding sentences for control by certain sections of UCC in case of conflict.[51] Also without discussion, attention is invited to other provisions: 9-206, captioned "Agreement Not To Assert Defenses Against Assignee" (gives limited permission for agreement not to assert defenses against assignee); 9-318, captioned, "Defenses Against Assignee; Modification of Contract After Notification of Assignment; Term Prohibiting Assignment Ineffective . . . "; 2-210, captioned "Delegation of Performance; Assignment of Rights" (see especially provisions that a right to damages for breach of whole contract or right arising out of assignor's due performance or entire performance may be assigned despite agreement otherwise, that unless circumstances indicate to contrary a prohibition of assignment of contract is to be construed only as barring delegation of assignor's performance,[52] and that when the assignment carries a delegation of duties, its acceptance by assignee constitutes a promise to perform[53]).

As to assignment matters, there was a case involving a suit for alleged unlawful termination of a beer distributorship,[54] in which, among other things, it was argued that there was no liability because there was no proper assignment of the contract from the original partnership. The Court refused to sustain that defense, stating that it is doubtful if the distributorship involved personal services and a relationship of confidence, but, in any event, what confidence there was continued with any member of the partnership running the business as a corporation, and consent was found in notice over a period of over eleven months of the corporation's taking over without objection. Priority of a bank, which took an assignment of rights of a seller in a real estate contract as collateral security, over a subsequent garnishment lien of creditors of the seller, was established in *Briley v. Madrid Improvement Company*.[55] It should be noted in connection with this situation that the results in such a situation may be affected by the requirements of Article 9 of the UCC

[49] *Assignments of Accounts Receivable—A Comment on Recent Iowa Legislation*, 6 DRAKE L. REV. 25 (1956).

[50] Ch. 413, § 10102, Laws 61st G.A., Iowa, 1965.

[51] *Id*, § § 10121, 10122, 10123.

[52] For reference to cases, articles, and other authorities on enforceability of contract restrictions on assignments see 6 DRAKE L. REV. 3, 22, n. 51, 52 (1956) and IOWA CODE § 539.2 (1962); UCC 2-210 is not referred to in the amendments of § 539.2 referred to in note 51 and accompanying text *supra*.

[53] See IOWA ANNOTATIONS § 164 for reference to Iowa cases in accord with this position.

[54] Des Moines Blue Ribbon Distributor Inc. v. Drewry's Limited, U.S.A. Inc., 256 Iowa 899, 129 N.W.2d 731 (1964).

[55] 255 Iowa 388, 122 N.W.2d 824 (1963).

as to security interest in contract rights and general intangibles where filing may be required to protect against the creditors even though the contract concerns land (UCC 9-102(3)).

Also, notation should be made of a recent statute that no assignment of wages (except to a labor organization representing employee with employer) is valid against an employer unless the employer in writing has agreed to accept and pay said assignment or order.[56]

4. Contracts in Iowa Revisited—Statute of Frauds.[57]

The Uniform Commercial Code has brought quite a few changes, some more restrictive and some less restrictive. As to amount, contracts for sale of goods for price of $500 or more are included,[58] which is a change in existing law, where no minimum amount is necessary before a writing is required. Methods of satisfying the requirement for a writing in connection with sales of goods are changed. The writing only has to indicate a contract for sale has been made between the parties and be signed by party to be charged; it is not material that a term is omitted or is incorrectly stated[59] except that it will be enforced only to the extent of the quantity shown in writing.[60] Between "merchants",[61] a concept of substantial importance under the Code, a writing, in confirmation of the contract and sufficient against the sender and received within a reasonable time, when the party receiving it has reason to know its contents, is sufficient against the receiver unless written notice of objection is given within ten days after it is received. Also, a contract will be enforceable if the goods are specially manufactured for the buyer (not *by* the seller as previously specified), and the seller, before notice of repudiation, has made a substantial beginning of manufacture or commitments for their procurement. Formerly, if there was part payment or acceptance and receipt

[56] Ch. 411, Laws 61st G.A., Iowa, 1965, amending IOWA CODE §§ 539.4, 536.17 (1962).

[57] 6 DRAKE L. REV. 62 (1957), supplemented in 12 DRAKE L. REV. 41, 50 (1962), and n. 116, 13 DRAKE L. REV. 131, 155 (1964) concerning Huston v. Gelane Co., 254 Iowa 752, 119 N.W.2d 188 (1963), which refused to apply the estoppel idea to dispense with need for writing in contracts over one year.

[58] UCC § 2-201. There are other Statute of Frauds provisions in the UCC. Section 1-206 starts with subsection (1): "Except in the cases described in subsection (2) [sale of goods, 2-201; securities, 8-319, security agreements, 9-203] of this section a contract for the sale of personal property is not enforceable by way of action of defense beyond five thousand dollars in amount or value of remedy unless there is some writing which indicates that a contract for sale has been made between the parties at a defined or stated price, reasonably identifies the subject matter, and is signed by the party against whom enforcement is sought or by his authorized agent." Section 8-319 parallels in substance 2-201, § 9-203 simply states that a security interest is not enforceable against the debtor or third party unless there is possession in the secured party or the debtor has signed a security agreement containing a description of the collateral.

[59] See also the discussion in text accompanying note 100 about the applicability of UCC 2-207 to written confirmations stating different or additional terms.

[60] Under § 8-319, as to investment securities, the writing must indicate a contract has been made, stating quantity of described securities at a defined or stated price.

[61] See definition of "merchant" in UCC § 2-104 (1), and the decision in Cook Grains Inc. v. Fallis, 395 S.W.2d 555 (Ark. 1965) that, for purposes of the Statute of Frauds section of the UCC and a suit by a grain dealer against a farmer for breach of contract to sell and deliver soy beans, a farmer was not a "merchant."

of a portion of these goods, the total agreement would be enforceable.[62] Not so now; it is enforceable only for the goods for which payment has been made and accepted, or for goods received and accepted.

Now that there is a statutory minimum before a writing is required in the sale of goods section, and in view of the change in the part payment effect as to goods, this will magnify the importance of the distinction between goods and interests in land, which are subject to Statute of Frauds section with no monetary minimum and still retaining the effect of payment of part of the purchase price.[63] It is accordingly necessary to call attention to the definition of goods in the UCC. The definition in section 2-105 (1) is:

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification [2-501] to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 2-107).

2-107 provides:

> (1) a contract for the sale of timber, minerals and the like or a structure or its materials to be removed from realty is a contract for sale of goods within this Article if they are to be severed by the seller but until severance a purported present sale thereof, which is not effective as a transfer of an interest in land is effective only as a contract to sell. (2) A contract for the sale apart from the land of growing crops or other things attached to realty and capable of severance without material harm thereto but not described in subsection (1) is a contract for sale of goods within this Article whether the subject matter is to be severed by the buyer or seller, even though it forms part of the realty at the time of contracting, and the parties can by identification effect a present sale before severance.

The need for a writing in sales of goods contracts is also dispensed with by other language. 2-201 states that:

> (3) A contract which does not satisfy the requirements of subsection (1) but which is valid in other respects is enforceable . . . (b) if the party against whom an enforcement is sought admits in his pleading, testimony or otherwise in court that a contract for sale was made, but the contract is not enforceable under this provision beyond the quantity of goods admitted.

This is not the same language as that which in Iowa formerly put obstacles to the raising of the defense of noncompliance with the Statute of Frauds. Although section 554.4, Iowa Code 1962, stated that "a contract to sell or a sale of any goods or choses in action shall not be enforceable by action", section 554.5 provided that "Sections 622.34 and 622.35 shall apply to sales of goods and choses in action".[64] These latter sections provided: "The above regulations relating merely to the proof of contracts ["Except when otherwise specially provided no evidence of the following enumerated contracts is competent" section 622.32] shall not prevent the enforcement of

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[62] IOWA CODE § 554.4(1) (1962).

[63] IOWA CODE § 622.32-.33 (1962). In connection with the enforcement of an alleged oral promise, found in conduct and circumstances, of heirs to divide up the property of a father, assistance in obtaining commitment of the father to an institution was held sufficient payment of part of the purchase price, unequivocally referable to an agreement, In re Lindsey's Estate, 254 Iowa 699, 118 N.W.2d 598 (1962).

[64] As pointed out in IOWA ANNOTATIONS §§ 178-11 and 199-1 this section, carrying

those not denied in the pleadings", and "The oral evidence of the maker against whom the unwritten contract is sought to be enforced shall be competent to establish the same." These references to Chapter 622 are now wiped away with the repeal of the old Chapter 554 (Uniform Sales Act) and the new language in UCC section 2-201 is that: "Except as otherwise provided in this section a contract for the sale of goods for the price of $500 or more is not enforceable by way of action or defense . . . ". Certain questions present themselves. It has been maintained, without direct Supreme Court authority, that the only appropriate way to raise the question of the Statute of Frauds was to deny the agreement (no doubt occasionally raising a question of conscience) and then to object at the trial to introduction of the oral testimony.[65] Without attempting to examine thoroughly all the pertinent arguments it is suggested that it may be possible under the UCC version to raise the question in a preliminary way without being compelled to first deny the contract by a motion to dismiss (R.C.P. 104) on the basis of a failure to state a claim on which relief can be granted, or by a separate adjudication of law points under R.C.P. 105, after there has been compliance with R.C.P. 91 that a pleading referring to a contract must state whether it is written or oral. Note that the new language does not require a denial of the contract before the question may be raised (i.e. a writing is required), but merely says that if there is an admission no writing is needed. Under this language these procedures may not be considered as an admission under the UCC,[66] because it is referring to affirmative admissions, not admissions by implication. Another question is, even assuming that silence while arguing the motions may not be the admission referred to under the UCC, whether the opposite party may be compelled to admit on the trial, or in other pretrial procedures, that a contract was made. A complicating factor in Iowa to the solution of this matter is the repeal, as to goods, of the clause stating that oral evidence of the maker is competent to establish the same. Again, without attempting to thoroughly explore the subject, and with awareness of the futility of attempts to decide what legislative intent was as to changing prior law, it is suggested that the general thrust of the Iowa situation is to prohibit compelling a party to admit that a contract was made.

5. Contracts in Iowa Revisited—Mistake[67]

Another case was presented of a personal injury claim and a cry of mistake because the amount paid did not cover the eventual settlement of dis-

into the Sales Act these sections of the general Statute of Frauds, was not adopted until 1925, six years after the adoption of the Uniform Sales Act.

[65] *How to Raise the Statute of Frauds as a Defense to an Unwritten Contract under the Rules of Civil Procedure,* 1 DRAKE L. REV. 27 (1951), as supplemented in 6 DRAKE L. REV. 63, 64 n. 11 (1957).

[66] See discussion in HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC § 1.1203 (1964). See also discussion in CORBIN §§ 277, 279, 288, 294 for discussion of legal effect of the Statute and WILLISTON § 527. Also consider the possible effect of R.C.P. 102 that if a fact pleaded is not denied it is considered to be admitted.

[67] 7(2) DRAKE L. REV. 3 (1958), supplemented by 12 DRAKE L. REV. 41, 53 (1962).

covered injuries.[68] In *Barnard v. Cedar Rapids City Cab Co.*,[69] the plaintiff, suing for damages alleged to have been negligently inflicted on the plaintiff by the defendants, was met by the defense of a release given by the plaintiff to one of the defendants for $100, as to which the plaintiff answered mutual mistake. A verdict was returned for plaintiff for $7,500. The plaintiff's position in the case was that at the time the release was given both she and the adjuster thought she had only received a lump on the head causing a headache which would shortly disappear, on the basis of reports by her doctor and an x-ray. Apparently, however, she had suffered a permanent injury, a "whip-lash" injury to the occipital nerves on both sides of her head, "greater occipital neuralgia", which required for correction a three hour operation. The release purported, in terms, to cover "all claims, demands, damage, action, cause of action or suits of any kind or nature whatsoever, and particularly on account of all injuries known and unknown, which have resulted or in the future may develop". The testimony was that $71.30 of the amount paid in the release was to cover hospital and doctor bill, lost time, apparent injuries, torn overshoes and hose and the rest "for inconvenience". The majority of the Court affirmed the submission to the jury of this case.

This writer has commented before about the problems in this area,[70] that permitting avoidance of a settlement agreement by an argument of mistake, however just that may seem in view of subsequent developments, goes contrary to the very purpose of compromise agreements, which is to settle the dispute. Arguments against avoiding the release are that the parties purport, by documents, at least, to release all present and future claims, that future development of an injury is not in the category of a present fact, and that there is really no mistake when there is a dispute and a compromise. There was extensive discussion of several prior Iowa cases, particularly *Jordan v. Brady Transfer & Storage Co.*,[71] *Wieland v. Cedar Rapids & Iowa City Railway Co.*,[72] and *Reed v. Harvey*.[73] This writer maintained that both *Reed v. Harvey* and *Jordan v. Brady Transfer* were not distinguishable on the facts from *Wieland*, but represented essentially a difference in philosophy, the *Jordan* and *Reed* cases permitted releases to be upset for mutual mistake as in any other cases, but *Wieland* permitted upset only if there were fraud, misrepresentation or other concealment. Now in the *Barnard* case, the majority opinion again attempts to distinguish on the facts saying that the *Wieland* case does not state a different rule of law than *Jordan*. This writer still disagrees with that conclusion, although believing as before that releases should not be free from the claim of mutual mistake which could include a mistake as to the nature and extent of personal injuries. The dissent (3 judges) dis-

[68] See extensive discussion in Dobbs, *Conclusiveness of Personal Injury Settlements: Basic Problems*, 41 N.C.L. REV. 665 (1963). Also, see recent case comment on Dansby v. Buck, 373 P.2d 1 (Ariz. 1962) in 4 8IOWA L. REV. 1033 (1963).
[69] ..... Iowa ....., 133 N.W.2d 884 (1965).
[70] See articles in 67 *supra*.
[71] 226 Iowa 137, 284 N.W. 73 (1939).
[72] 242 Iowa 583, 46 N.W.2d 916 (1951).
[73] 253 Iowa 10, 110 N.W.2d 442 (1961).

agrees with the basic philosophy of using the doctrine of mutual mistake to avoid releases, especially in cases of mistake as to severity of releasor's injuries, and quotes from Williston that:

> Thus where a release is given by one injured in an accident and more serious injuries develop than were supposed to exist at the time of the settlement, it is a question of fact whether the parties assumed as a basis for the release the known injuries, or whether the intent was to make a compromise for whatever injuries from the accident might exist whether known or not.[74]

Then the dissent says:

> The intent to compromise the claim for injuries 'which might exist whether known or not' could not be more clearly expressed than in the instant case. . . The real question is, did the contract as made cover all injuries 'known or unknown which have resulted or may in the future develop'? The language of the release is definite that it did . . . The plaintiff got exactly what she bargained for, and the purchaser of the release should be entitled to the same right.[75]

The weakness of this argument is that, when referring to an intent to compromise this claim for all injuries which might be unknown or known, it pays attention only to the terms of the writing. The whole argument of rescission for mutual mistake as to facts, whether in releases or other situations, is that avoidance should be permitted even if "the plaintiff got exactly what she bargained for," if the mutual mistake as to a fact is so material that the party would say, "If I'd known then what I know now I wouldn't have agreed." Although the intent of the releasee many times may be to obtain a complete release for all known and unknown injuries regardless of the assumed facts as to injuries or other consequences, nevertheless the situation is at the same time likely to be one in which the releasee knows or should know that the other party is assuming certain conditions and is not consciously intending to cover all possible developments. The argument of the dissent is the objective view of contracts applied "with a vengeance." It may be conceded that, from the point of view of contract formation, offer and acceptance and mutual assent, the court must accept the principle of holding someone, who in general manifests consent to a document he knows, or should know, to be a contract, to all the terms of the document whether he reads them or not. It may also be conceded, for purpose of this discussion, that if the parties are trying to argue that a document which contains certain clauses, or does not contain a clause, should be changed (reformed) to conform to a claimed agreement as to these clauses, the court should not permit this change in the document without strong evidence of what the parties intended to accomplish in the writing. However, there is nothing, in that displayed preference for the objective manifestation of an agreement which is based largely on the assumed greater reliability of written evidence, and on the belief that one party is relying on the document as to what the other party has consented to, to preclude the argument of avoidance because of mistaken assumptions. The argument of rescission because of mistake should not be foreclosed just by clauses slipped in a document. The dissent decries the injury to the principle that the law favors compromises. The result of the majority does not weaken

[74] WILLISTON § 1551.
[75] 133 N.W.2d 895, 902 (1965).

that principle, except that it realistically approaches the question of what was being compromised. Realistically compromises should be analyzed in terms of whether the parties consciously considered the risk, and proceeded in ignorance of the future. The policy of favoring the stability of contracts does not require that avoidance of a release may be foreclosed by the use of phrases in documents not consciously consented to.

Reformation was granted in another case, *Walnut Street Baptist Church v. Oliphant.*[76] In that case an offer to purchase, prepared by the buyer, contained a clause that buyer shall pay assessments for public improvements on which a final plat and schedule of assessments had not been adopted by the municipality as of that date. This was accepted by the seller, a church. At the time of final closing, an attorney for the church, relying on a purported copy of the agreement presented by buyer, permitted acceptance of a check for the total price less the cost of paving, and gave a deed without exclusion of this item. The trial court reformed the contract to conform to the deed. The Supreme Court reversed and reformed the deed to conform to the contract as they found it and ordered judgment for the amount withheld. The Court observed that the defendant cannot excuse the difference between the executed contract and the deed on the theory he had not read the offer to purchase, noting especially that one who prepares the agreement will have it strictly construed against him. The Court reformed the deed, noting that if an instrument as written fails to express the true agreement, equity will grant relief regardless of the cause, whether fraud, mistake in use of language or anything else which prevents the instrument from expressing the true intent of parties. There was evidence that at a church meeting considering the offer, special attention was given to the possibility of assessments.

6. Contracts in Iowa Revisited — Illegality[77]

Traditionally, courts under the guise of saying the agreement is illegal or contrary to public policy have, within somewhat narrow limits, even without a statute specifically calling for such result in a civil action, policed agreements and refused to enforce same. The UCC has several sections deliberately inviting a court to refuse to give the assistance of the court even though no other formal rule is involved. Section 2-302 states that: "If the Court as a matter of law finds the contract to be unconscionable[78] at the time it was made the court may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, so as to avoid any unconscionable result." Note that this is specifically for the court to decide as a matter of law. The Comments to the *Official Edition of the UCC*, which are not comments by legislative groups, but by the sponsoring organizations, state, in pertinent part:

> The basic test is whether, in the light of the general commercial background and the commercial needs of the particular trade or case the clauses involved are so one-sided as to be unconscionable

[76] ..... Iowa ....., 135 N.W.2d 97 (1965).

[77] 8 DRAKE L. REV. 3 (1958), supplemented in 13 DRAKE L. REV. 3, 10 (1963).

[78] See discussion of this concept in Note, *Unconscionable Contracts: The Uniform Commercial Code*, 45 IOWA L. REV. 843 (1960). Also, see Note, *Contractual Limitation of Contract Liability*, 47 IOWA L. REV. 964 (1962).

> under the circumstances at the time of the making of the contract . . . The principle is one of prevention of suppression and unfair surprise and not of disturbance of allocation of risks because of superior bargaining power.

In Section 1-203 it states: "Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement." In the case of "merchants," defined in 2-104(1), under section 2-103(1) (b), good faith is defined to mean honesty in fact and observance of reasonable commercial standards of fair dealing in the trade, although the general definition in 1-201(19) is honesty in fact. Also it should be noted that, as provided in section 1-203(3), the effect of provisions of the Act may be varied by agreement, except as otherwise provided by the Act[79] and except that the obligation of good faith, diligence, reasonableness and care prescribed by the Act may not be disclaimed by agreement but the parties may by agreement determine the standards by which the performance of such obligation is to be measured if such standards are not manifestly unreasonable.

Certain other cases involved recurring problems of illegality: promise by an employee not to compete with former employer was enforced;[80] agreement shifting responsibility for own negligence enforced;[81] agreements to discharge liability for unpaid support money awarded as a part of a divorce settlement enforceable if the best interests of the child are not injured;[82] non-enforceability of an agreement with a city in violation of competitive bidding requirement;[83] brother of insured was considered to have an insurable interest so as to enforce life insurance policy in which the

[79] See, for example § 2-318 as to extension of warranty to members of family, § 9-501 as to certain rights of debtor and default in security agreements, and § 2-719, as to contractual modification or limitation of remedy.

[80] Hulsenbusch v. Davidson Rubber Co., Inc. 344 F.2d 730 (8th Cir. 1965) (written covenant forbidding employee to divulge trade secrets or to work for himself or competitor in automobile crash pad industry for two years after employment enforceable).

[81] Northern Natural Gas Co. v. Roth Packing Co., 323 F.2d 922 (8th Cir. 1963) (gas company, supplying gas to company outside city limits where it had a franchise, held able to enforce clause of contract disclaiming liability for injuries to persons or property beyond point of delivery to customer, even though it did not specifically refer to negligence, so as to expect packing company to pay for settlement of claim by Gas Company with rabbi and employees of packing company who made claims for negligence against Gas Co.; such agreement not contrary to public policy; Gas Co. is not operating as public utility here); Richards v. A.T. & S.F.R. Co., 226 F. Supp. 812 (S.D. Iowa 1964) (railroad not liable for injuries sustained by disembarking passenger who was traveling under gratuitous pass, containing release of liability for injuries in absence of showing railroad was guilty of gross negligence; provision of pass valid under federal law). Epley v. Patti Constr. Co., 228 F. Supp. 1 (N.D. Iowa 1964) (general contractor entitled to recover indemnity against subcontractor under contracting provision even though contractor negligent); Seymour v. Chicago & N.W. Ry. Co., 255 Iowa 780, 124 N.W. 2d 157 (1963) (railroad, in furnishing ground for installation of equipment, not acting as common carrier, so free to impose such conditions as it chooses).

[82] Burrell v. Burrell, 256 Iowa 490, 127 N.W.2d 78 (1964) (where agreement to exchange liability for support money for visitation and custody rights, but not on any permanent basis, husband was not liable for unpaid support money but trial court properly ordered resumption of payment in future); Wren v. Wren, 256 Iowa 484, 127 N.W.2d 643 (1964) (no sufficient evidence to show father was relieved of payments).

[83] Everds Brothers v. Gillespie, 256 Iowa 317, 126 N.W.2d 274 (1964) (property owners, sued by paving contractor to recover balance due for street paving in new addition to city, could not recover from city on alleged oral agreement to pay 25% of cost of paving where no competitive bidding procedures were followed; municipal contract made in violations of statute not merely voidable but void).

brother of the insured was the beneficiary and paid premium;[84] cancellation clause in fire insurance policy valid;[85] arbitration may be compelled where contract involves interstate commerce even though such a provision may not be valid under state law;[86] real estate broker unlicensed during negotiations but licensed in Iowa at time cause of action arose entitled to recovery of commission.[87] One particularly interesting case involved the legality of a TV bingo game.[88] In this program bingo was played, for prizes, by television viewers who were required to obtain, in person, cards from one of the sponsoring companies, new each week as a new game was played. The prevailing viewpoint (4 judges of the Supreme Court plus the trial judge) was that this was a lottery, apparently on the two-pronged argument that there is consideration, one of the elements of a lottery, in the detriment involved in going to the store to pick up the card and benefit in increased traffic in the store, or that, even if there were no consideration in the case of those who did not otherwise buy merchandise on their visits to the stores, the enterprise was a lottery because of the purchase of goods by some. The dissenters (4) subscribe to an opinion which starts out by saying "the premise . . . is wrong, the factual situation necessary to support the finding is lacking and the result is unsound."[89] The argument is, however, mostly, that this bingo game is not evil and that the second *Mabry* case[90] which held a "smorgasbord bingo" arrangement, in which one could play bingo for prizes without buying a meal, to be a lottery, was based on a different statute, section 726.1, IOWA CODE (games for money or other things), than section 726.8 (lottery), without any explanation of why a different result should follow.

7. Contracts in Iowa Revisited — Offer and Acceptance[91]

There have been substantial changes made in the UCC as to formation of a contract for the sale of goods. Traditionally there was no enforceable agreement unless the terms were reasonably definite and certain, with special reference to such matters as price, quantity, and delivery terms. Indefiniteness presents much less of a hurdle to enforceability under the UCC. Particularly note, in section 2-204, it provides that:

> (1) A contract for sale of goods may be made in any manner sufficient to show an agreement, including conduct by both parties which recognizes the existence of such contract . . . .
> (3) Even though one or more terms are left open a contract for sale does not fail for indefiniteness if the parties have intended to make a contract and there is a reasonably certain basis for giving an appropriate remedy.

Also, see Humboldt v. Knight, 255 Iowa 22, 120 N.W.2d 457 (1963), refusing to enforce promise to furnish perpetually free water to grantees of land in spite of agreement of estoppel.

[84] Rettenmaier v. Rettenmaier, 255 Iowa 952, 124 N.W.2d 453 (1963) (also held that proceeds of policy were not required to be applied to indebtedness of insured to brother because of absence of showing of agreement to do so).

[85] Oliver v. Employers Mut. Cas. Co., ... Iowa ....., 136 N.W.2d 330 (1965).

[86] Younker Bros. Inc. v. Standard Constr. Co. Inc., 241 F. Supp. 17 (S.D. Iowa 1965) (motion by general contractor sustained for stay of proceedings in owner's case against it and owner's architect, pending arbitration).

[87] Pound v. Brown, ... Iowa ....., 140 N.W.2d 183 (1966).

[88] Idea Research and Development Corp. v. Hultman, 256 Iowa 1381, 131 N.W.2d 496 (1964).

[89] 131 N.W.2d 496, 501 (1964).

[90] State v. Mabry, 245 Iowa 428, 60 N.W.2d 889 (1954).

[91] 8 DRAKE L. REV. 91 (1959), supplemented in 13 DRAKE L. REV. 3, 18 (1963).

Of course the more terms left open, the less likely there will be found an intent to make a contract. The UCC itself makes provision for supplying missing terms needed for performance, open price terms, remedies, etc. For instance, section 2-305, on open price terms, states that if the price is not settled the price is a reasonable price at the time of delivery even if the price is left to be agreed to by the parties and they fail to agree. Section 2-308 supplies terms on place of delivery; 2-209 on time. Quantity of goods would seem to present some trouble, however, because the court may find no reasonable basis for giving an appropriate remedy. Also note, in the above reference, that in an agreement to which the Statute of Frauds is applicable there is enforcement only to the stated quantity.[93]

The old rule, permitting revocation of offers stated to be for a particular time, when there was no consideration for the offer, has been partially modified. Section 2-205 states that:

> An offer by a merchant in a signed writing which by its terms gives assurance that it will be held open is not revocable for lack of consideration during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months; but any such term of assurance on a form supplied by the offeree must be separately signed by the offeror.

The UCC also attempts to say something about the manner of acceptance, in section 2-206: "Unless otherwise unambiguously indicated by the language or circumstances an offer to make a contract shall be contrued as inviting acceptance in any manner and by any medium reasonable in the circumstances." This would presumably make inapplicable, at least in a mechanical fashion, to contracts for sales of goods, the statement made in an early Iowa case that a telegraphed response to a mailed offer was not authorized and that the acceptance was not effective, if at all, until received.[94]

A special problem of method of acceptance is created where the offer calls for shipment. Does this mean that acceptance is to be by promise of shipment or by shipment? The UCC in section 2-206(1)(b) clearly indicates this will be construed as inviting acceptance by promise to ship or by shipment. If shipment is to be the acceptance and the offeree ships non-conforming goods, this would in the common law view be treated as a counter-offer with the difficulty that there would be no contract binding the offeree to supply goods in accordance with the terms of the offer, and the situation might lead to a contract on the basis of the counter-offer because of possible acceptance by the original offeror of the counter-offer by exercising dominion and control over the property.[95] The UCC attempts to control this situation by stating that the offer to buy for prompt or current shipment shall be construed as inviting acceptance by prompt or current shipment of conforming or non-conforming goods. Although this is not crystal clear, it seems to say that such an action, shipping non-conforming goods, is both an acceptance and a breach,[96] a notion strange

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[93] *Supra* text accompanying note 57.

[94] Lucas v. Western Union Telegraph Co., 131 Iowa 669, 109 N.W. 191 (1906), followed in Hunt Truck Sales & Service v. Omaha Standard, 187 F. Supp. 796 (S.D. Iowa 1960).

[95] CORBIN § 75 n. 39 § 89 n. 24.

[96] HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC § 1.1302 (1964); BUNN, SNEAD & SPEIDEL, AN INTRODUCTION TO THE UCC § 2.9 (D) (1964).

to those adhering to orthodox notions of contract law who would ask how there can possibly be an agreement if there is no agreement. There is an escape-hatch here, however, in the statement that such a shipment of nonconforming goods does not constitute an acceptance if the seller seasonably notifies the buyer that the shipment is offered as an accommodation to the buyer.

Beginning of requested performance presents problems both to the offeror and the offeree. The offeror may attempt to revoke before the offeree finishes. This has been met in various ways: by applying section 45 in the *Restatement of Contracts* to stop revocation after part performance (not just mere preparation); by interpreting the offer as calling for an acceptance by a promise, and finding a promise in the starting to perform; or by using section 90 of the *Restatement* so that any substantial reliance on the offer would support enforceability of the promise.[96] Unless the idea of a bilateral contract is used, however, the offeree is under no obligation to finish because he has made no promise. The UCC says something about this in subsection 2-206 (2): "Where the beginning of a requested performance is a reasonable mode of acceptance an offeror who is not notified of acceptance within a reasonable time may treat the offer as having lapsed." Although this subsection probably clearly takes care of the case where a promise to complete, as manifested by starting performance, is a reasonable method of indicating acceptance, in requiring a reasonable notice of such starting as a part of the method of indicating acceptance, there is some doubt whether it says anything about the case where unambiguously the completion of the performance is the only method of acceptance. In literal terms the subsection does not apply to that situation.[97]

Traditional counter-offer rules have been changed by the UCC, with special application to the so-called "battle of forms." Under traditional rules even though there were words or conduct manifesting acceptance, the statement of additional or different terms made it a counter-offer, not an acceptance,[98] and under many circumstances led to a contract on the basis of the changed terms because there were goods shipped at the same time as the changed terms, and accepted, leading to a conclusion of acceptance of a counter-offer on the basis of changed terms, by exercising dominion over the goods.[99] The same questions, of whether there is a contract, and

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[96] 8 DRAKE L. REV. 91, 97 (1959).

[97] See BUNN, SNEAD & SPEIDEL, AN INTRODUCTION TO THE UCC § 2.9 (E) (1964), HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC § 1.1303 (1964), and Comment 3 to 1962 OFFICIAL TEXT OF UCC § 2-206: "The beginning of performance by an offeree can be effective as acceptance so as to bind the offeror only if followed within a reasonable time by notice to the offeror. Such a beginning of performance must unambiguously express the offeree's intention to engage himself. For the protection of both parties it is essential that notice follow in due course to constitute acceptance. Nothing in this section however bars the possibility that under the common law performance begun may have an intermediate effect of temporarily barring revocation of the offer, or at the offeror's option, final effect in constituting acceptance."

[98] RESTATEMENT §§ 35 (1) (a), 38, 59, 60; CORBIN § 90; WILLISTON § 77.

[99] CORBIN § 75 n. 39, § 89 n. 24.

if so, what are the terms, receive somewhat different treatment under the UCC. As to the question whether there is a contract, the UCC now provides in section 2-207 that:

> (1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it states terms additional to or different from those offered or agreed upon, unless acceptance is expressly made conditional on assent to the additional or different terms.
> (2) The additional ["or different" added in Iowa] terms are to be construed as proposals for addition to the contract.

Parenthetically it should be noted that this section also applies to the situation of a written confirmation of a previously existing agreement, not just to the offer-acceptance situation (the negotiation of an agreement), so the language of "operates as an acceptance" must, in this context, refer in most cases to providing a memorandum for enforceability under the Statute of Frauds discussed above in connection with section 2-201.[100] Although this section avoids the "ribbon-matching" technique of the common law to determine if there is a contract, there are still the questions whether there is a "definite and seasonable[101] acceptance" and whether the offeree has made the acceptance expressly conditional upon assent to the additional or different terms, especially if the terms are in conflict, that is, "different," and not just additional. A conclusion of "definite and seasonable acceptance" is more likely, if the language is otherwise language of acceptance, where the terms are merely additional terms, or the "different" (conflicting) terms are not in the usual negotiated terms of price, quality, quantity, and delivery terms, but in other printed terms in various forms used as purchase orders and acknowledgement forms. One case under the Code, much criticized, at least in rationale, if not in result, was *Roto-Lith Ltd. v. F. P. Bartlett*,[102] in which there was a shipment of merchandise, emulsion for adhesive to be used in making cellophane bags, and accompanying forms (Acknowledgement and Invoice) disclaiming all warranties, which shipment was made, in response to an order from the buyer, that would, apart from disclaimer, support a claim of warranty. The Court held that there was no contract by the forms in spite of section 2-207 because this was a material variation in terms by the seller and that, accordingly, this was, in terms of the foregoing statutory quotation, an acceptance "expressly conditional on assent to the additional or different terms" and that, following the common-law position, there was a contract formed by acceptance of goods by the buyer in response to stated terms by the seller, excluding warranties. There was no discussion in the opinion about the other possible argument that, because of the materiality, and other language, there was not a definite and seasonable acceptance, or the possible argument that the acceptance was "expressly conditional upon assent to

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[100] Davenport, *How to Handle Sales of Goods: The Problem of Conflicting Purchase Orders and Acceptances and New Concepts in Contract Law*, UNIFORM COMMERCIAL CODE HANDBOOK 65, 71 (ABA, 1964).

[101] See provision in UCC § 1-204(3) that: "An action is taken 'seasonably' when it is taken at or within the time agreed or if no time is agreed at or within a reasonable time."

[102] 297 F.2d 497 (1st Cir. 1962). See comment on this case in 2 UCC REPORTER-DIGEST 127 (Hart-Willier 1965) with citation of other comments. Also see BUNN, SNEAD & SPEIDEL, AN INTRODUCTION TO THE UCC § 2.10(C)(1964); HAWKLAND, A TRANSACTIONAL GUIDE TO THE UCC §§ 1.090301, 1.090302 (1964).

the additional or different terms" because of a phrase in the acknowledgement that "if these terms are not acceptable buyer must so notify seller at once." Note at this stage of analysis that if there is a definite and seasonable acceptance not expressly conditioned on assent to the different terms, there is a contract by the writings instead of no contract at all on the terms of the offeror unless other terms become a part of the contract under other principles.

Terms of the contract may be affected by these additional provisions of 2-207:

> (2) The additional ["or different" added in Iowa] terms are to be construed as proposals for addition to the contract. Between merchants, such terms become part of the contract unless: (a) the offer expressly limits acceptance to the terms of the offer; (b) they materially alter it; or (c) notification of objection to them already has been given or is given within a reasonable time after notice of them is received.

The Iowa version of the Code adds the words "or different" to the phrase in subsection 2-207(2) so as to read: "The additional or different terms are to be construed as proposals for additions to the contract," apparently to make the wording correspond to subsection 2-207(1). The Permanent Editorial Board for the UCC, in Report No. 2 of October 31, 1964, rejects this type of amendment as harmless because "different" terms will not become part of the contract because they have already been objected to, thus applying subsection 2-201(2)(c).

Where there has been an acceptance under 2-207(1), but there are different or additional terms, and these terms do not become a part of the contract under 2-207(2), as for instance when they materially alter the contract, or the proposals are not between merchants, there is no clear indication of what is required before these terms become part of the contract. Section 2-204 simply provides that: "(1) A contract for sale of goods may be made in any manner sufficient to show agreement, including conduct by both parties which recognizes the existence of such a contract." However, Comment 3 to section 2-207 states:

> [W]hether or not additional or different terms will become part of the agreement depends upon the provisions of subsection (2). If they are such as materially to alter the original bargain, they will not be included unless expressly agreed to by the other party. If, however, they are terms which would not so change the bargain they will be incorporated unless notification of objection to them has already been given or is given within a reasonable time.

Remember that lack of consideration would not alone be an objection to enforcement of the modification (UCC 2-209(1)).

Where the writings do not establish a contract, enlightenment as to the terms of the contract will be found in subsection 2-207(3) which states that:

> Conduct by both parties which recognizes the existence of a contract [as shipment of merchandise and acceptance of it] is sufficient to establish a contract for sale although the writings of the parties do not otherwise establish a contract [as where there is no definite acceptance, or where there is acceptance expressly conditioned on assent to the additional or different terms]. In such a case the terms of the particular contract consist of those terms on which the writings of the parties agree, together with any supplementary terms incorporated under any other provisions of this Act.

For example, as in the *Roto-Lith* case, *supra,* where there arguably

was no contract by the writings, there may be a contract established by the conduct of the parties (UCC § 2-204), dropping out terms on which writings do not agree (here warranties) and thus leaving the way for supplementary terms, warranties implied by other provisions of the Code,[103] contrary to the result in the *Roto-Lith* case, and contrary to the result at common law. It should be remembered that, in the situation of written confirmations, a quantity term may not be deleted under an agreement within the Statute of Frauds because of the provision of section 2-201(1): "A writing is not insufficient because it omits or incorrectly states a term agreed upon but the contract is not enforceable under this paragraph beyond the quantity of goods shown in such writing."

There were several interesting cases involving attempts to bind persons to terms not expressly consented to in specific terms. In *Goltz v. Humboldt Livstock Auction, Inc.*,[104] the defendant, an auctioneer, sued for an alleged breach of warranty in connection with the sale of cattle, moved for a directed verdict on the theory of a disclaimer of warranty found in a sales bill given after the auction was completed. The Court refused to overrule the refusal of the trial court to grant a directed verdict because the sale was complete before the sales bill was given and because, under section 554.72 of the Iowa Code (Uniform Sales Act[105]), authorizing negating warranties by express agreement, the sale bill itself did not amount to an express agreement between the parties. It is not clear from the opinion whether this is based on the fact that the sale was complete before the document was given or whether it is saying there is not an express agreement where terms of the disclaimer are simply slipped in a document. A new trial was granted, however, because of refusal to admit evidence of photographs of a statement on the walls of the sales barn in prominent places announcing in clear printed letters, "All guarantees between buyer and seller; all livestock at owner's risk. We act as commission agents only"; and because of evidence by the president of the defendant corporation excluding any responsibility and evidence of others at the auction that they heard the president say those things. Note that under the UCC the specific disclaimer, if it otherwise complied with the requirements of the UCC for disclaimers of warranty (2-316), would not become part of the agreement between merchants as a proposal for additional terms in a written confirmation or acceptance not objected to because it would materially alter the contract, as discussed above. *Des Moines Blue Ribbon Distrib. v. Drewrys Limited*,[106] discussed above in connection with termination of a distributorship, also considered this problem and concluded that a party to an agreement is not necessarily bound by terms in a letterhead where they are in conflict with typewritten terms.

The Iowa position that an insurance company may be held liable for

[103] §§ 2-314, 2-315.

[104] 255 Iowa 1384, 125 N.W.2d 773 (1964). Accord: Turner v. Kunde, 256 Iowa 835, 128 N.W.2d 196 (1964) (no disclaimed of warranty in "weigh slip" could vary implied warranty where sale before delivery of slip). Voluntary acceptance of a deed poll binds the grantee to performance of contracts contained therein. Fort Dodge, D.M. & So. Ry. v. American Etc. Corp., 256 Iowa 1344, 131 N.W.2d 515 (1964) (plaintiff denied specific performance of land contract against vendee because of unmerchantability). UCC Section 2-328 contains rules as to sale by auction.

[105] See § 2-316 UCC for regulations as to exclusion of warranty liability.

[106] 256 Iowa 899, 129 N.W.2d 731 (1964).

negligence in failing to use reasonable care in completing or rejecting insured's policy application was reaffirmed in *Werthman v. Catholic Order of Foresters*,[107] but there was a reversal of a judgment for the applicant's widow and children for a new trial because of the trial judge's use of words, "A high degree of care" and "higher degree of care than might obtain in an ordinary case," a standard not required.

An insurance company was held liable on an automobile insurance policy for damages to automobile and for medical expenses, even though the policy period had expired, on the theory of estoppel created out of past practice of the insurance agent in keeping the policy, receiving renewal notices, remitting premiums to the company, and charging these premiums to the insured's bank account at varying times without a check.[108] The immediate controversy grew out of action by the agent on May 24, 1963, in sending to insured, then living in a different community, a letter, which referred to policy number, but not to Company, stating: "your policy expires 6/8/63. Please take out your insurance with an agent in your own local area as we think this would help you in your claim work by having a close agent. Thanks a lot Carl. Please let me know when you have done this so you won't be charged for a new policy."

Nothing was done about this until after the expiration date and a loss, when insured, learning of agent's termination of policy, sent premium payments to the company, properly noted as to number, which were received and cashed but applied to another agency where insured had in the meantime transferred his business. The Court affirmed the trial court's holding that there was an implied contract established by custom for automatic renewal, no effective termination and right to rely. The dissent stated that although the insured might have the right to rely on custom, the evidence clearly showed the plaintiff did not in fact so rely because he understood the policy was expiring. Note that this is really an argument of finding a promise of automatic renewal, then deciding if there has been an effective termination of the offer; the language of estoppel tends to mask the real problem.

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[107] ..... Iowa ....., 133 N.W.2d 104 (1965). Also, see Ullman v. Reed, ... Iowa ....., 137 N.W.2d 690 (1965) which held that evidence, (adduced in effort to establish that automobile casualty insurance company and its agent were liable, on theory of estoppel and waiver, to extend liability coverage to the vehicle driven by one who had made application for coverage, the denial of which was not communicated to him before the accident, though an unreasonable period had assertedly elapsed and though the agent had assertedly known of the denial) was insufficient where there was no evidence that automobile involved in collision would have been covered by policy if issued.

[108] Laverty v. Hawkeye Security Ins. Co., ... Iowa ....., 140 N.W.2d 83 (1966). See discussion of Sanborn v. Maryland Casualty Co., 255 Iowa 1319, 125 N.W.2d 758 (1964) in 13 DRAKE L. REV. 131, 152 (1964), followed in the majority opinion, using the estoppel doctrine in case of an alleged promise of automatic renewal of policy where a principal argument of merger of the promise in written policies for yearly periods (Parol Evidence Rule) was urged and rejected. Apparently, in the present case, the agent kept the policies and renewal statements himself, and the insured did not even know what company he was insured in until a short time previously when he had a small claim. A directed verdict for defendant was sustained in Olson v. Norwegian Mut. Ins. Ass'n., ... Iowa ....., 140 N.W.2d 91 (1966), an action for windstorm loss, because of failure of plaintiff to establish an oral agreement for renewal thereof beyond the period in the policy originally issued to plaintiff's grantor and transferred to plaintiff, and failure to establish estoppel as to renewal by failure to send notice of expiration date based only on prior practice in mailing notice of premiums due.

Also repeated, in connection with a claim by a daughter against the mother's estate for services rendered, was the rule that, although the presumption of gratuity applies when services are rendered to a member of a family, this may be overcome by showing express agreement of payment or that the member of the family against whose estate the claim is made was not capable of rendering or did not render reciprocal services of proportionate character.[109]

8. Contracts in Iowa Revisited — Fraud, Duress and Undue Influence.[110]

There were a few additional cases in this area, calling only for limited description: a trial court judgment for plaintiff was affirmed for actual damages and punitive damages for fraud and misrepresentation in the sale of dancing lessons to the plaintiff, an elderly widow;[111] judgment, for purchasers, for fraud of sellers in failing to disclose the fact that a duplex was built on improperly compactly-filled ground,[112] was affirmed; another case involved a confidential relationship which places the burden of proof of fairness on the grantee[113] and the trial court was affirmed in holding the burden had not been met in connection with a transfer of some bonds and bank accounts; an action for fraud in connection with a distributorship failed because of lack of evidence to show scienter in connection with a forecast of business, or intention not to perform the contract.[114]

9. Contracts in Iowa Revisited — Performance, Breach and Remedies.[115]

There is a great amount of detail in the UCC on the matter suggested by this title, especially in Article 2. Sections 2-501 *et seq.* contain a variety of sections on Performance, sections 2-601 *et seq.* include sections on Breach, Repudiation and Excuse, and Part 7 includes sections on Remedies. The matters referred to are too numerous to discuss here.[116] As illustration, note section 2-614 on commercial impracticability in berthing, loading, or unloading facilities as an excuse; 2-615, setting up the defense of impracticability by the occurrence of a contingency, the non-occurrence of which was a basic assumption on which the contract was made (note this refers to an excuse for the seller, not for the buyer); 2-716, authorizing specific performance where the goods are unique or in other proper circumstance (in the words of the Official Comment "seek[ing] to further a more liberal attitude than some courts have shown in connection with the specific performance of contracts of sale");[117] 2-718, "liquidation of damages";

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[109] In re Claim of Blackman, 256 Iowa 1076, 129 N.W.2d 618 (1964).

[110] 9 DRAKE L. REV. 3 (1959), supplemented in 13 DRAKE L. REV. 108, 131 (1964).

[111] Syester v. Banta, ... Iowa ....., 133 N.W.2d 666 (1965) (judgment of $14,300 actual and $40,000 punitive damages upheld; the court observed that the instructions were closer to the "out of the pocket" rule than the "benefit of the bargain" rule which it stated Iowa follows; punitive damages, although requiring malice, may be based on something less than actual ill will or express malice; plaintiff was required to prove issues, in connection with release, by clear, satisfactory and convincing evidence).

[112] Loghry v. Capel, ... Iowa ....., 132 N.W.2d 417 (1965).

[113] Jeager v. Elliott, ... Iowa ....., 134 N.W.2d 560 (1965).

[114] Kelly Tire Service Inc. v. Kelly Springfield Tire Co., 338 F.2d 248 (8th Cir. 1964).

[115] 9 DRAKE L. REV. 66 (1960), supplemented in 13 DRAKE L. REV. 131, 137 (1964).

[116] See Peters, *Remedies for Breach of Contracts Relating to the Sale of Goods under the Uniform Commercial Code: A Roadmap for Article Two*, 73 YALE L.J. 199 (1963).

[117] See Note, *Specific Performance: A Liberalization of Equity Standards*, 49 IOWA L. REV. 1290 (1964).

2-725(1) of the Official Text providing for a 4-year statute of limitation for contracts of sale (dropped in the Iowa version); 2-610, "Anticipatory Repudiation"; 2-609, "Right to Adequate Assurance of Performance"; 2-601, "Buyer's Rights on Improper Delivery," affected by other sections including 2-508, "Cure by Seller of Defective Performance" and 2-612, "Installment Contract Breach"; 2-705, Seller's Remedies; 2-711, Buyer's Remedies; 2-718, "Liquidation or Limitation of Damages; Deposits"; 2-605 "Waiver of Buyer's Objections; Failure to Particularize"; 1-207, "Performance or Acceptance Under Reservation of Rights."

Again it was stated that mutuality of remedy is not necessary in specific performance, in *Urbain v. Speak*[118] in which the Court, reversing the trial court, held the purchaser was entitled to specific performance of a contract for sale of land although the contract described more land than the vendor owned, when the vendee did not claim any more than vendor owned. As to damages it was repeated that exemplary damages are not recoverable in absence of showing of actual damages.[119]

The proposition that, where there is a breach of an express condition precedent in an insurance policy, prejudice to the insurer is presumed but that such presumption is rebuttable, a proposition criticized in a prior discussion as improperly dispensing with an express condition precedent even with the statement of presumed prejudice,[120] was repeated in *Western Mutual Insurance Company v. Baldwin*,[121] a case involving an alleged breach of the "cooperation" clause of a farmer's liability policy and alleged falsehoods and withholding of information in connection with a fire which damaged a railroad bridge, but the Supreme Court found for the insurer, reversing the trial court's finding that the presumption of prejudice had been overcome, and held that the existence of prejudice does not depend on weighing the dollars involved.

The proposition that an absolute and unconditional tender stops the accrual of further interest on sums presently due was referred to in *In re Zach's Estate*,[122] charging interest on purchase amounts from the date that exercise of options to purchase given in will were filed in the estate, until final settlement, when purchasers were in possession, on the balance of purchase price stated in will less each son's share in the estate.

10. Contracts in Iowa Revisited — Scope and Interpretation.[123]

The UCC has a few sections on this subject matter, the Parol Evidence Rule and Interpretation. As to interpretation of the words that are in the document, note the clear references in section 1-205, that a course of dealing between the parties and usages of trade give particular meaning to and supplement or qualify the terms of the agreement, and section 2-208 referring to the use of course of performance as relevant to determine meaning. The Official Comments to 1-205 definitely announce the rejection of a Conveyance or dictionary approach to meaning which leads courts in

[118] ..... Iowa ....., 139 N.W.2d 311 (1966) (a claim of mental incompetency, with evidence to show that his unsoundness was such that he had no reasonable perception of the nature and terms of the contract).
[119] Golden Sun Feeds, Inc., v. Clark, ... Iowa ....., 140 N.W.2d 158 (1966).
[120] 13 DRAKE L. REV. 131, 138 (1964).
[121] ..... Iowa ....., 137 N.W.2d 918 (1965).
[122] ..... Iowa ....., 131 N.W.2d 484 (1964).
[123] 10 DRAKE L. REV. 87 (1961), supplemented in 13 DRAKE L. REV. 13, 151 (1964).

many situations to reject evidence of this sort unless there is a determination by the Court that the words are ambiguous.

The tendency, in many Iowa cases, to refuse (under the guise of the Parol Evidence rule) to permit evidence of prior agreement or contemporaneous agreement outside the writing just because there is written agreement, should be blunted by the UCC. Section 2-202 states that:

> Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented (a) by course of dealing or usage of trade (Section 1-205) or by course of performance (Section 2-208); and (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

The crucial words are "intended by the parties as a final expression of their agreement with respect to such terms as are included therein" and "intended as a complete and exclusive statement of the terms of the agreement." This surely will stop the inclination that regards the mere presence of a written document as sufficient to invoke the Parol Evidence Rule, as the Iowa Court on occasion has manifested.[124]

The written document was an insuperable obstacle in some recent Iowa cases, but not in others. In *International Milling Co. v. Gisch*[125] the plaintiff sued in equity[126] on a series of notes and to foreclose a chattel mortgage on turkeys and turkey raising equipment, as to which defendant counterclaimed at law for damages alleging fraud. The allegation of fraud was apparently directed solely to the end of avoiding personal liability on the notes which would be apparent from the fact that documents called "Delivery Invoice and Promissory Note" were signed, and the fact that the chattel mortgage contained a statement that "The mortgagee to remain liable for any deficiency." The allegation of fraud was based on an alleged misrepresentation made by a representative of the company as to the effect of the papers signed. Defendant testified essentially that the representative of the company, with whom he had dealt before, when asked if the promissory note made him personally liable, said no, and that he (defendant) would not have entered the turkey program except for the statement as to no personal liability, which he believed. There was also evidence that after the disastrous season the company requested additional land security (which was refused) because chattel security had not been satisfactory in the past. There was corroboration of this representation. The trial judge directed a verdict against the defendant on his counterclaim. This was reversed by the Supreme Court (a majority thereof) stating that oral evidence was ad-

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[124] 10 DRAKE L. REV. 87 n. 5 (1961).

[125] ..... Iowa ....., 137 N.W.2d 625 (1965). In connection with a stockholder's derivative action against a director for alleged misconduct, evidence as to what was included in a certain conditional sales contract was held admissible in spite of the Parol Evidence Rule as urged by plaintiff, because the instrument is collateral evidence and the action is not based on the contract: Charles v. Epperson Co., ... Iowa ....., 137 N.W.2d 605 (1965); see 10 DRAKE L. REV. 87, 97 (1961).

[126] A prior opinion on the issue of granting a summary judgment, and whether the defendant debtor, pleading fraud in answer to an equity petition, was entitled to a jury trial, was 256 Iowa 949, 129 N.W.2d 646 (1964).

missible to prove fraud (as permitted by the trial court) in spite of the Parol Evidence Rule that a simple promise of future conduct is not a representation of an existing fact, so as to constitute fraud; and that a contemporaneous parol agreement not to hold the maker of a note personally liable does not constitute fraud in the inception of the note; as to which rules the court adheres, but that here the jury could find that the statements were more than opinion, were intended to be facts, that false representation as to the law as distinguished from mere misunderstanding as to law, may constitute an assertion of fact, and that where the defendant was so reassured the Court can not say as a matter of law that the defendant is precluded from recovery of damages. The language of the majority opinion leaves doubt. For instance, how can the Court say that the Court still adheres to cases that hold a contemporaneous oral agreement not to hold the maker of a note personally liable does not constitute fraud, and yet hold they are not controlling here because the jury might find this was more than an expression of opinion. What is the fact to be relied on? Particularly puzzling is the language, "The statements did not relate to a right under the instrument that the plaintiff might or would waive in the future. They note as facts the limits of plaintiff's rights under the instrument."[127] Ordinarily a question of law is not considered as a fact unless made by an expert.[128] The real controversy then, not highlighted in the majority opinion, really seems to be over the extent to which the person may rely on statements as to the contents of an instrument. The dissent states:

> The conduct of the plaintiff may be classified as a high handed business method and it may shock our sense of fair play and morality, but such alone does not serve to make it a fraudulent transaction. The defendant counterclaimant had been in the turkey business for years and was neither illiterate or incompetent. He read the contract, was never precluded from so doing and in fact asked several pointed questions about some material portions before signing. He should not now be heard to effectively cry fraud as to that which was well known to him before he affixed his signature to the agreement.

However, in spite of the majority's dubious use of the fraud argument as a way of getting away from the words of the document, its result (denying personal liability) is preferred. Looked at as a problem of "meeting of minds", based on mutual consent to terms of personal liability because of terms in the documents, only a most ritualistic, mechanical application to the "objective manifestation" rule, holding persons to terms of documents to which they have consented, would prevent assertion of lack of understanding and agreement as to terms in themselves unambiguous when there is an argument of misrepresentation. If it be thought, as courts many times do, that there must be reformation of the written document to conform to the claimed prior oral agreement (here an agreement of no personal liability) such action should not be precluded by an argument of negligence in not reading and using your own intelligence when there has been misrepresentation, when the words used do not conform to the meaning intended.[129] If viewed as a problem of

[127] ..... Iowa ....., 137 N.W.2d 625, 631 (1965).

[128] PROSSER, TORTS § 104, p. 740 et seq. (3rd ed. 1964); RESTATEMENT § 474.

[129] See discussion of some prior Iowa cases as to effect of negligence of party seeking to avoid being bound by arguing for reformation or simply arguing "no consent"; 7 DRAKE L. REV. 3, 9, 19 (1958).

promising not to enforce a right everybody understands is in the agreement, and thus raising the specter of the Parol Evidence Rule, this should be answered by the contention that there is no evidence the parties intended the document to really contain the agreement of the parties, that the document was not an integrated contract, and did not contain all the promises of the parties. The majority opinion should have clearly stated its position that, first, inquiry should be made to see if the parties really intended the document to be a final expression of their agreement including evidence of prior or contemporaneous agreements as relevant to that purpose, and that, even if so agreed, reformation should be available, in spite of negligence, and that evidence should be admitted to show the words used do not represent the real intent of the parties, even though unambiguous.

As indicated in a prior article, the Parol Evidence Rule is a story of exceptions or refusals to apply the Rule that are so numerous as to almost completely deny the existence of the Rule. In a recent case, *Gordon v. Witthauer,*[180] the Iowa Court held for admissibility of oral evidence as to a promise made prior to a lease, on the basis of admitting oral evidence of agreements (inducing execution of a contract) that are acted upon by the party to be charged in ways which can be found as a fact to be referable to the parol agreement. The action was one by a tenant against his landlord for breach of an alleged express warranty that the landlords would install adequate heating and air conditioning equipment. The lease form stated: "Lessors agree to connect two walk-in coolers, air conditioner and furnace" and that "lessee has examined said premises and accepted same in present condition." The Court concluded such statements were not ambiguous so as to permit introduction of oral evidence on this basis. However, the Court did permit evidence of alleged oral promises that the air conditioning and furnace would be adequate, and evidence of reliance by the tenant, on the theory first mentioned. However, although not granting defendant's motion for judgment notwithstanding the verdict for plaintiff, the Court ordered a new trial for error in the instructions because the court instructed merely that plaintiff was to prove defendant's promise, that plaintiff relied thereon, that the unit was not adequate, and damages. The Supreme Court held that the jury should also be required to find in addition that the acts claimed to be performed by the defendant were in fact performed in compliance with the claimed oral agreement. The Court also observed that there was evidence in the record to support such a finding, apparently referring to testimony as to installation of space heaters, and reducting work on air conditioner in response to complaints. It is not clear from this whether it means the proof need be only that the acts taken by themselves are referable to the alleged oral agreement or whether the proof must be that the defendant believed himself to be complying with the oral promise. Although any result that does not prevent the use of parol testimony may be approved, the continued reference to exceptions to the Rule does not produce

[180] ..... Iowa ....., 138 N.W.2d 918 (1965). That the former exceptions to the Parol Evidence Rule may still apply under UCC 2-202, even though not specifically mentioned therein, was held in Associated Hardware Supply Co. v. Big Wheel Distributing Co., 355 F.2d 114 (3rd Cir. 1966), allowing fraud in the inducement as a defense, under the authority of UCC 1-103 that "Unless displaced by the particular provisions of this Act the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions."

clarity and predictability in this area. The assumption that the writing controls unless there is an exception should be replaced by an approach that the question is merely whether the writing was intended to replace all other agreements and what those other agreements were.

That the Parol Evidence Rule still may prevent the introduction of parol evidence is illustrated in two other cases. In *Schroedl v. McTague,*[131] in connection with an action on a note, the Court held that a defense, that the note was in fact a receipt for an investment by the plaintiff in a business venture, should be stricken because no attempt was made to reform it or to plead fraud. This argument was apparently an attempt to show that the note was an inaccurate recital of fact, an argument which the court could properly reject,[132] even though the argument (for admission of parol evidence) might be otherwise made that the writing was not a complete integration of the agreement of the parties, if supported by the facts, and that parol evidence should be admissible without giving excessive weight to the mere form of a writing. The Parol Evidence Rule was also used to reject the admissibility of certain evidence in *Schnabel v. Vaughn*[133] an action by a sublessor against sublessees for rent allegedly due under a written sublease. The defense offered was that the sublessor entered into another subsequent sublease, substantially for the same period of time, with another party and that this second sublease, together with an underlying agreement of rental of part of the premises by the first sublessee from the second sublessee amounted to a surrender of the first sublease so that first sublessee had no obligation to pay rent beyond the earlier termination date of the second sublease. Plaintiff denied the second sublease superseded the first sublease and offered evidence tending to prove the sole purpose of the second sublease was to provide evidence the second sublessee could use to obtain a necessary automobile dealer's license, and that it was never intended to be effective between the parties. The evidence also included testimony that the second sublessee paid rent to the first sublessee who also paid the utilities. The Court affirmed the trial court's holding for the defendant and the rejection of this evidence on the basis of the Parol Evidence Rule. The Court refused to apply the exception to the Parol Evidence Rule (where the evidence is introduced to show the writing was executed without any intention of affecting legal relations between the parties and as a sham) because the evidence indicated the sole purpose was to perpetrate a fraud against the state. The complete rejection of the evidence under the Parol Evidence Rule seems unjustified, even though the problem of credibility of the evidence might still remain.[134] Whatever justification for the Parol Evidence Rule there may be in order to prevent enforcement of agreements not actually made, this does not suggest a pure moralistic purpose of punishment. Furthermore if evasion of the law is of concern in the present case, it may be difficult from the facts given in the opinion to avoid the impression that all parties were knowledgeable of the situation. Also it should be noted that in this case the Court is allowing the Rule to be invoked by a person not a party to the agreement.

[131] 256 Iowa 772, 129 N.W.2d 19 (1964).
[132] See discussion in 10 DRAKE L. REV. 81, 97, 98 (1961).
[133] ..... Iowa ....., 140 N.W.2d 168 (1966).
[134] See discussion in CORBIN §§ 577 and 1473 disapproving of cases holding the Parol Evidence Rule applicable were evidence was introduced to show a sham. See also WILLISTON § 654.

Although if the Rule should otherwise apply it should also be applied to cases where the claim of the third person is under the contract,[185] the Iowa Court has on occasion said the Rule should not be applied where a third party is involved.[186]

Cases raising interpretation problems are referred to only in the footnotes.[187]

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[185] CORBIN § 596; WILLISTON § 647.

[186] See 10 DRAKE L. REV. 87, 88 n. 13, (1961); 13 DRAKE L. REV. 131, 155 (1964).

[187] (a) Insurance contracts, if ambiguous, interpreted most favorably to insured: Indemnity Insurance Co. v. Pioneer Valley Savings Bank, 343 F.2d 634 (8th Cir. 1965), affirming 225 F. Supp. 404 (N.D. Iowa 1964) (interpretation of word "loan" in Banker's Blanket Bond exclusion as applied to a check kiting transaction); Rogers v. American Insurance Co., 338 F.2d 240 (8th Cir. 1964) (action on business interruption policy held unambiguous); Northwestern States Portland Cement Co. v. Hartford Fire Ins. Co., 243 F. Supp. 386 (N.D. Iowa 1965) (business interruption policy as to cement manufacturer held unambiguous; also held no waiver of defenses where insured admitted liability only according to terms of policy); Wilson v. State Farm Mutual Auto. Ins. Co., 256 Iowa 844, 128 N.W.2d 218 (1964) (decedent, who was retail route salesman delivering milk from house to house, and who was killed when his truck, which had started backing down incline after he had left it, overturned and crushed him as he was attempting to regain control of it, was not engaged in duties incident to "operation, loading or unloading of commercial automobile" within exclusionary clause of accidental death policy; four justices in dissent thought the words were not ambiguous, stating "only a lawyer could find anything ambiguous"); Aeroline Flight Service, Inc. v. Insurance Co. of No. Am., ... Iowa ....., 133 N.W.2d 80 (1965) (under aircraft policy, dealer did not "surrender legal possession" where the dealer left aircraft at airfield for members of flying club, which was to purchase that aircraft, or another, to try out).

(b) Interpretation of guarantor's liability as to preferred stock to be interpreted in light of accompanying circumstances and intent of parties, although dissent stated circumstances should not be used where there is no ambiguity: Miller v. Geerlings, 256 Iowa 569, 128 N.W.2d 207 (1964) (guaranty of dividends by corporation by organizer of corporation interpreted to be a guaranty of payment rather than a guaranty of collection).

(c) Listing contract granting broker exclusive right to sell did not entitle broker to commission when owner sold property themselves: Stromberg v. Crowl, ... Iowa ....., 132 N.W.2d 461 (1965).

(d) Parol evidence is admissible to show what the parties intended to include in a lease of premises described by street number: Brecht v. Cedar Rapids Development Co., ... Iowa ....., 136 N.W.2d 287 (1965) (question of whether parking for customers to rear of rented tavern included in lease; also referred to problem of language in notice to exercise option to extend lease, that it must be unequivocal, but if unambiguous, the statutory provision (IOWA CODE § 622.22, 1962) about understanding of parties, brought into this case by the letter of landlord purporting to state his understanding, has no application).

(e) Meaning of contract must be determined from all the words used: Iowa Nat. Mut. Ins. Co. v. Fidelity & Cas. Co. of N. Y., 256 Iowa 723, 128 N.W.2d 891 (1964) (although husband's automobile may have been included in definitions in wife's automobile policy, other parts of contract as indicated in declarations, references only to one car, dictate an interpretation that it was not so included).

(f) Parol evidence was admissible to determine whether "terminations" were included in the sale of an insurance agency when interest of intervener sold is not specified: Ballagh v. Polk-Warren Mut. Ins. Ass'n., ... Iowa ....., 136 N.W.2d 496 (1965) (also see reference to problem of proving custom and usage as to application of so-called American Agency System).

(g) Where the description of real property in a deed was unambiguous, and no reformation was sought for fraud or mistake, evidence as to intention of parties as to land to be included was not admissible, but in a quiet title action, the Court, on the basis of estoppel, quieted title to vendees in land not described, where a garage was constructed and septic tank installed in full view of grantor who failed to object: Alcorn v. Linke, ... Iowa ....., 133 N.W.2d 89 (1965).

(h) Duty to give effect to language in accordance with plain and ordinary meaning and not make new contract for parties: Spataro v. Battani, ... Iowa ....., 139 N.W.2d 396 (1966) (interpretation of reserve account in connection with assignment of conditional sales contracts).