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FORGING A GOOD UNILATERAL CONTRACT¹ OR A SERIES OF GOOD CONTRACTS OUT OF A BAD BILATERAL CONTRACT

JOHN D. CALAMARI*

INTRODUCTION

The title of this article is suggested by an article written by the late Dean Finn,² then Professor Finn, in the *Brooklyn Law Review*.³ In that article Dean Finn urged, "Let us forge good unilaterals out of bad bilaterals if conscience points the way."⁴

That article did not attempt to formulate rules which would help determine when the forging should occur. Professor Williston comes little closer to the formulation of a rule when he states: "An insufficient bilateral agreement may *sometimes* by performance on one side become a valid unilateral contract."⁵

The purpose of this article is to explore some of the problems concealed in Williston's use of the word "sometimes" and to set forth some general rules which should apply to any phase of this problem. It will also examine the related problem of forging a series of good contracts out of a bad bilateral contract.

GENERAL BACKGROUND

The problems to be discussed can best be put into focus by a simple illustration. At common law, A, a married woman, enters into an agreement with B, whereby she agrees to clean his house in exchange for his promise to pay ten dollars. Concededly, this gives rise to a void bilateral contract⁶ under the doctrine of mutuality,⁷ because of A's total⁸ incapacity to contract. If she performed, the question would

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1. It is interesting to observe that the case of *Los Angeles Traction Co. v. Wilshire*, 135 Cal. 654, 67 Pac. 1086 (1902), engaged in the converse process of forging a good bilateral contract out of a potentially bad unilateral contract. See *Restatement, Contracts* § 45 (1932); *Petterson v. Pattberg*, 248 N.Y. 86, 161 N.E. 428 (1928).

2. Late Dean, Fordham Law School.

3. Finn, *The Forging of Good Unilaterals out of Bad Bilaterals*, 3 *Brooklyn L. Rev.* 6 (1933).

4. *Id.* at 22.

5. 1 Williston, *Contracts* § 106 (rev. ed. 1936). (Emphasis added.)

6. See 1 Corbin, *Contracts* § 146 (1950) [hereinafter cited as Corbin].

7. See note 27 *infra*.

8. The word "total" is used here in contrast to the cases where incapacity renders the promise voidable rather than void. See notes 22 and 40 *infra*.

arise whether her performance would justify a contractual⁹ recovery notwithstanding the fact that the bilateral contract was void.¹⁰ This is what is involved in forging a good unilateral contract out of a bad¹¹ bilateral contract.

As above stated, the purpose of this article is to explore the rules governing this doctrine and the related doctrine previously mentioned. It is not the purpose of this article to examine all or even many of the cases on the subject; rather, its purpose is to point out the correct approach to the problem and the necessary distinctions by analyzing the landmark cases found in most casebooks on contracts.

At the outset, the question of forging a good unilateral contract out of a bad bilateral contract will be considered. In this connection, two rules which are of general application will first be set forth; then an examination in some detail of the particular problems created by illusory promises will be essayed. Finally, these cases will be compared with cases involving the related doctrine of forging a series of good contracts out of a bad bilateral contract.

I. FORGING A GOOD UNILATERAL CONTRACT OUT OF A BAD BILATERAL CONTRACT

A. The plaintiff must have made the promise requested by the defendant.

The first of the two general rules to which previous reference has been made, is that the plaintiff must have made the promise requested by the defendant. The significance and validity of the rule can best be demonstrated by an illustration. Assume that A requests that B promise to paint the outside of A's summer house (at a time when A is not present in his house)¹² in exchange for A's promise to pay \$200. If B does not promise but actually does the work, then, under the provisions of the Restatement,¹³ there is a contract (subject to the rule stated in Section 56),¹⁴ provided such performance is completed

9. As opposed to a quasi contractual recovery. The doctrine of forging a good unilateral contract out of a bad bilateral contract relates to forging a true contract rather than a quasi contract.

10. 1 Corbin § 147 indicates that doctrine of forging a good unilateral contract out of a bad bilateral contract would apply here, but that she could not recover because of her inability to sue.

11. The word bad is herein used to indicate that although an offeree makes the counterpromise requested by the offeror, the agreement may still be void (bad) for a number of reasons. See notes 22 and 40 infra.

12. This fact is posited so that there is no possibility of inferring a promise from the act itself, thus eliminating the possibility of a bilateral contract arising. See generally Restatement, Contracts § 21 (1932).

13. Restatement, Contracts § 63 (1932).

14. Section 56 relates to the necessity for notice after the act called for in a unilateral contract has been performed. The Restatement position appears to

or tendered within the time allowable for accepting by making a promise.¹⁵

The rule found in Section 63 of the Restatement is an exception to the general rule that an acceptance "must comply exactly with the requirements of the offer, omitting nothing from the promise . . . requested."¹⁶

Without debating the wisdom or the justice of the rule propounded by Section 63,¹⁷ it is apparent that where an offer looks to a bilateral contract (save for the limited exception set forth in Section 63), the counterpromise requested in the offer must be made either expressly or impliedly;¹⁸ otherwise, there is no contract, neither bilateral nor under the doctrine of forging a good unilateral contract out of a bad bilateral contract.

The Restatement illustrates¹⁹ the rule and the limited nature of the exception as follows:

A writes to B, "I will pay you \$100 for plowing Flodden field, if you will promise me by next Monday to finish the work before the following Saturday." B makes no promise but completes the requested plowing before the following Monday and promptly notifies A that he has done the work. There is a unilateral contract.²⁰ There would be no contract²¹ had B finished the plowing on Tuesday, having made no promise.

In a word, the first rule to be remembered is that, except for the limited exception provided in Section 63 of the Restatement, the doctrine of forging good unilateral contracts out of bad bilateral contracts does not apply when the bilateral contract is "bad" because the return promise requested was never made.

What the doctrine envisages is that the requested counterpromise is made, but for some other reason the bilateral contract is "bad," that is, void.²²

have substantially adopted the rule of *Bishop v. Eaton*, 161 Mass. 496, 37 N.E. 665 (1894). Contrary rules are suggested in such cases as *City Nat'l Bank v. Phelps*, 86 N.Y. 484 (1881). *Kresge Dep't Stores v. Young*, 37 A.2d 448 (D.C. Munic. App. 1944).

15. This means that even though the required promise is not made, there is a unilateral contract if the work was completed while the offer was still open.

16. Restatement, Contracts § 59 (1932).

17. Goble, *Is Performance Always as Desirable as a Promise to Perform*, 22 Ill. L. Rev. 789 (1928).

18. See note 12 *supra*.

19. There is only one illustration under Section 63 of the Restatement.

20. This illustrates the very limited area in which, according to the Restatement, a good unilateral contract can be forged out of a bad bilateral contract where the return promise is not made. (Author's footnote.)

21. That is, there would be no bilateral contract and no possibility of forging a good unilateral contract out of a bad bilateral contract. (Author's footnote.)

22. Where the offeror makes an offer which requests a counterpromise and the counterpromise is made, a bad (void) bilateral contract may still arise because

B. The act done by the plaintiff under the bad bilateral contract must constitute legal detriment under the doctrine of consideration.

The second general principle which must be kept clearly in mind is that the doctrine in question does not apply unless the act done under the bad bilateral contract was detrimental under the doctrine of consideration.

Two illustrations will readily demonstrate the validity of this requirement.

In *Hay v. Fortier*,²³ the defendant was under an undisputed obligation to presently pay the plaintiff a liquidated sum.²⁴ The defendant and the plaintiff then entered into a bilateral agreement whereby the plaintiff agreed to forbear suit on the aforesaid obligation if the defendant would make certain payments by April, which would satisfy the obligation. The court held there was not sufficient consideration²⁵ for the plaintiff's promise to forbear, because the defendant was promising to do only what she was legally obligated to do at the time of the agreement.²⁶

On the other hand, it is clear that the plaintiff in promising to forbear is suffering a detriment. He is promising to refrain from instituting an action which he has a legal right to initiate. However, since the defendant could not enforce the plaintiff's promise under the doctrine of mutuality,²⁷ even though the plaintiff has made a

of such doctrines as consideration, mutuality, illusory promises, indefiniteness, illegality and capacity. There is not a "bad" bilateral contract where one or both of the promises to a bilateral contract is voidable as opposed to void. We will not here attempt to explore the exact line which separates void from voidable promises. Suffice it to say that the problem under discussion arises only when there is a void rather than a voidable promise. See note 11 supra and note 40 infra.

23. 116 Me. 455, 102 Atl. 294 (1917).

24. For the meaning of the term liquidated, see 1 Williston, Contracts § 129 (3d ed. 1957) [hereinafter cited as Williston]; 1 Corbin § 188.

25. See *Foakes v. Beer*, 9 App. Cas. 605 (1884), which states the rule that even though a part of a matured liquidated debt or demand has been given or received in full satisfaction thereof, the creditor may yet recover the remainder. Ultimately, the doctrine of this case is merely an application of the pre-existing duty rule to the effect that promising to do or doing what one is legally obligated to do is not a detriment. See also 1 Williston § 101, wherein a distinction is made between cases in which there is no consideration, and those in which there is not sufficient consideration. Since in either case an unenforceable promise results, the distinction is not always noted herein. The phrase "legal detriment" and the word "detriment" are used interchangeably herein.

26. The court did not advert to the possibility that the defendant in permitting interest to accrue might have been suffering detriment. For cases contra, see *Olmstead v. Latimer*, 158 N.Y. 313 (1899); *Kellogg v. Olmsted*, 25 N.Y. 189 (1862). But see, *Adamson v. Bosick*, 82 Colo. 309, 259 Pac. 513 (1927); 1 Williston § 122.

27. The meaning of this phrase and its proper use has been much disputed.

promise involving a detriment to himself, he (the plaintiff) may not enforce the promise of the defendant.

Here, although the plaintiff has made the promise requested, the bilateral contract is "bad" because of the doctrines of consideration and mutuality. However, since the plaintiff did forbear for the stated period, the court allowed him to recover, thus forging a good unilateral contract out of a bad bilateral contract.

The court in effect said that if the defendant had made an offer looking to a unilateral contract, the plaintiff could have recovered because the plaintiff in forbearing did suffer detriment.²⁸ In a word, the doctrine of mutuality of obligation applies only to bilateral contracts and not to unilateral contracts.²⁹

Thus, not only did the plaintiff make the promise requested by the defendant, but in addition, the act done under the bad bilateral contract was a detriment which would have been sufficient consideration had it been bargained for as the consideration for a unilateral contract.

This case should be carefully contrasted with the following fact pattern which also involves the doctrine of mutuality. A enters into a bilateral contract with B in which A promises to ride B's horse in the Derby in return for B's promise to pay \$10,000. On the day of the race A threatens³⁰ not to ride. C, a stranger, promises A an additional \$1,000 if A will promise to ride. A makes the promise and rides.

Under the orthodox view,³¹ C's promise is not enforceable because

Ballantine, *Mutuality and Consideration*, 28 Harv. L. Rev. 121 (1914); Corbin, *Non-Binding Promises as Consideration*, 26 Colum. L. Rev. 550 (1926); Oliphant, *Mutuality of Obligation in Bilateral Contracts at Law*, 28 Colum. L. Rev. 997 (1928); Oliphant, *Mutuality of Obligation in Bilateral Contracts*, 25 Colum. L. Rev. 705 (1925). The phrase is used here in its proper sense, i.e., that both promises in a bilateral contract are unenforceable if either of them is unsupported by consideration. 1 Williston § 105 A.

28. The plaintiff was under no legal duty to forbear.

29. 1 Williston § 105 A; 1 Corbin § 147.

30. The general rule is that a threat not to perform an existing contract cannot furnish the ground for a charge of duress. *Secor v. Clark*, 117 N.Y. 350, 22 N.E. 754 (1889). Cf. Kessler, *Book Review*, 61 Yale L.J. 1092, 1102 n.52 (1952).

31. In *DeCicco v. Schweizer*, 221 N.Y. 431, 433, 117 N.E. 807, 808 (1917), Judge Cardozo states the law on the subject as follows:

There is a general acceptance of the proposition that where A. is under a contract with B., a promise made by one to the other to induce performance is void. The trouble comes when the promise to induce performance is made by C., a stranger. Distinctions are then drawn between bilateral and unilateral contracts; between a promise by C. in return for a new promise by A., and a promise by C. in return for performance by A. Some jurists hold there is consideration in both classes of cases. . . . Others hold that there is

A is merely promising to do what he is legally obligated to do.³² A's promise, though supported by detriment,³³ is not enforceable as previously explained³⁴ under the doctrine of mutuality of obligation.

Does the fact that A performed permit the forging of a good unilateral out of a bad bilateral contract³⁵ as it did in *Hay v. Fortier*?³⁶ Here, as in the *Fortier* case, the plaintiff, A, made the promise requested by the defendant C; but here, contrary to *Fortier*, not only was A's promise not detrimental, but the doing of the act was not detrimental, at least under the orthodox pre-existing duty rule.³⁷ Thus, a good unilateral contract cannot be forged in this case because the act performed by A was not detrimental.

Thus, to forge a good unilateral contract out of a bad bilateral contract there are two fundamental requirements. First, the plaintiff must have made the promise which the defendant requested, and second, the act done by the plaintiff under the "bad" bilateral contract must constitute detriment under the doctrine of consideration.

C. Illusory Promises.

One of the most interesting areas where the problem of forging a good unilateral contract out of a bad bilateral contract arises in the cases subsumed under the general heading of illusory promises.³⁸ Obviously, a bilateral contract is bad where one or both of the promises is illusory.³⁹ This is so because the promisor in using the words which he does, reserves to himself an unlimited power of avoidance⁴⁰ and therefore in reality promises nothing.⁴¹

consideration where the promise is made for a new promise, but not where it is made for performance. . . . Others hold that there is no consideration in either class of cases.

It is the last view to which the author refers as the "orthodox view."

32. *Arend v. Smith* 151 N.Y. 502, 45 N.E. 872 (1897); *Williston, Successive Promises of the Same Performance*, 8 Harv. L. Rev. 27, 34 (1894).

33. C in promising to pay \$1,000 is clearly suffering a detriment.

34. See notes 22 and 27 *supra* and accompanying text.

35. See notes 12, 19, 20 and 26 *supra* and accompanying text.

36. 116 Me. 455, 102 Atl. 294 (1917).

37. See notes 31 and 32 *supra*.

38. See 1 Corbin § 145; 1 *Williston* § 104.

39. 1 Corbin § 145.

40. This situation must be clearly distinguished from the many cases where the law grants to a promisor an unlimited power of avoidance. In the latter cases, although this may appear to be somewhat anomalous, there is not a "bad" bilateral contract, but rather a "good" bilateral contract binding until it is avoided. For example, there is a good bilateral contract where a promise is voidable because of infancy or fraud. 1 *Williston* § 105; 1 Corbin § 146. Such cases, therefore, do not fall within the purview of this article.

41. See note 22 *supra*. In this connection it should be noted that an illegal contract is not always void. 5 *Williston* §§ 1630-64A. Thus an illusory promise

At the outset, a distinction must be made between the cases where a party attempts to sue upon the illusory promise, and where the party who made the illusory promise after performance seeks to enforce the non-illusory promise.

For example, if A promises to work for B for a year in return for B's promise to pay him "a fair share of the profits," there is a "bad" bilateral contract because B's promise is too vague and indefinite⁴² and therefore illusory.⁴³ Even if A performed there would be no possibility of forging a good unilateral contract because B's promise would still continue to be indefinite. The most that A could obtain is a quasi contractual recovery.⁴⁴

But what of the converse case where the party who has made the illusory promise performs; should the non-illusory promise be enforced?⁴⁵

Strong v. Sheffield,⁴⁶ at first blush at least, appears to be such a case. There the defendant promised to pay her husband's note which was already due and the plaintiff promised to forbear "until such time as I want my money,"⁴⁷ and then did forbear for two years.

Assuming that plaintiff's promise is illusory,⁴⁸ this appears to be

is a void promise and, as in the case of other void promises, it cannot furnish consideration for the counterpromise, and the entire agreement fails as a bilateral contract for want of mutuality of obligation. Restatement, Contracts § 80 (1932); cf. 1 Corbin § 147.

42. *Varney v. Ditmars*, 217 N.Y. 223, 111 N.E. 822 (1916).

43. 1 Corbin § 142 states that an indefinite promise is a species of illusory promise.

44. As previously mentioned, a quasi contractual recovery does not involve forging a good unilateral contract out of a bad bilateral contract.

45. Speaking of the converse situation with respect to an agreement void for indefiniteness, Williston states that if the side of the agreement which was originally too vague for enforcement becomes definite by performance, the other side of the agreement becomes binding. 1 Williston § 49. However, the cases which he cites involve forging a good series of contracts out of a bad bilateral contract. This is also true of the illustration given in the companion section of the Restatement. Restatement, Contracts § 33 (1932). This type of case is covered in Part II of this article.

Cases such as *Perreault v. Hall*, 94 N.H. 191, 49 A.2d 812 (1946), which involve the curing of indefiniteness by a subsequent definition of the intended performance are not relevant to this discussion, because, as Corbin points out, such cases are not forging a good unilateral contract out of a bad bilateral contract, but rather are, in effect, stating that the parties have agreed bilaterally that the performance rendered should be paid for in accordance with the promise first made. 1 Corbin § 143.

46. 144 N.Y. 392, 39 N.E. 330 (1895).

47. *Id.* at 395, 39 N.E. at 331.

48. If A is indebted to B, and C promises to become liable on the debt in exchange for B's promise to forbear until such time as B wants his money, and B so promises, it is certainly arguable that B's promise is not illusory because

a case where the party who has made an illusory promise and performed seeks to enforce the non-illusory promise.

The court decided against the plaintiff, stating that "the consideration is to be tested by the agreement and not by what was done under it."⁴⁹

This plausible sounding sentence cannot withstand scrutiny. If this statement is literally true, then there can never be, in any case,⁵⁰ any possibility of forging a good unilateral contract out of a bad bilateral contract.

It is submitted that, despite this reckless generalization, this case was probably correctly decided. One problem with this case is that the facts are not sufficiently delineated. As stated, the court tells us that the defendant promised to pay the note in question and that the plaintiff promised to forbear "until such time as I want my money."⁵¹ However, the court neglected to state what promise the defendant asked the plaintiff to make.

If the defendant asked the plaintiff to forbear for a particular time or by implication for a reasonable time,⁵² then the court correctly decided the case because, before a good unilateral contract can be forged, the plaintiff must make the counterpromise requested.⁵³ If these were the facts, then there would be no question of forging a unilateral contract out of a bad bilateral contract.⁵⁴

he has impliedly promised not to sue at least until a demand has been made. Apart from cases involving negotiable instruments, where C's promise would appear to be enforceable, see, e.g., *Duncan v. First Nat'l Bank*, 122 Okla. 168, 251 Pac. 69 (1926). The most nearly analogous cases are those where a party has reserved the power to cancel at any time by giving notice. Corbin makes an excellent argument as to why such a promise should not be deemed illusory. However, he appears to concede that the majority of the cases are against his position. 1 Corbin § 163. Cf. *Sylvan Crest Sand & Gravel Co. v. United States*, 150 F.2d 642 (2d Cir. 1945); 1 Williston § 104.

49. *Strong v. Sheffield*, 144 N.Y. 392, 396, 39 N.E. 330, 331 (1895).

50. If taken literally, this means that where there is a void bilateral contract there is never any possibility of forging a good unilateral contract. As a universal rule this is obviously false, as shown in Parts I A and B of this article. See *Hay v. Fortier*, 116 Me. 455, 102 Atl. 294 (1917).

51. *Strong v. Sheffield*, 144 N.Y. 392, 395, 39 N.E. 330, 331 (1895).

52. See *Traders' Nat'l Bank v. Parker*, 130 N.Y. 415, 29 N.E. 1094 (1892).

53. Part IA supra. Simpson appears to ignore this requisite when he states,

A void bilateral contract, defective because one of the promises is insufficient consideration for the other, will become a valid unilateral contract by performance of the defective promise provided the performance was legally detrimental to the party who rendered it. . . . Simpson, *Contracts* § 37 at 105 (1954).

This statement, as has been pointed out, is only a half truth. Simpson, in addition, totally ignores the case under discussion.

54. If the defendant asks for forbearance for a reasonable time, and plaintiff promises to forbear for as long as he wishes, there can be no good contract

However, what would be the result if the promise made by the plaintiff was the promise which the defendant asked him to make, that is to say, if the defendant had asked the plaintiff to promise to forbear "until such time as you want your money," and the plaintiff so promised, and then did forbear for two years?

Assuming that the plaintiff's promise is illusory,⁵⁵ this raises the problem, previously introduced, of what would occur where the party who made the illusory promises seeks to enforce the non-illusory promise. A comparison with *Hay v. Fortier*⁵⁶ will demonstrate that an additional problem is presented. In each case the plaintiff made the counterpromise, and the act performed by the plaintiff was detrimental. However, in *Fortier* the defendant requested the plaintiff to forbear until April and the plaintiff did so. In the case last assumed the defendant exacted an illusory promise and the plaintiff relying thereon did forbear for two years.

Under these circumstances should forbearance for a reasonable time entitle the plaintiff to enforce the defendant's promise, or should it be held that defendant's promise is unenforceable because he did not spell out the requested detriment with sufficient definiteness? Although strict logic might dictate otherwise,⁵⁷ it would appear fairer to hold that the plaintiff should be permitted to recover when he had forborne for a reasonable time.⁵⁸

II. FORGING A SERIES OF GOOD CONTRACTS OUT OF A BAD BILATERAL CONTRACT

Attention is now focused on the related question of forging a series of good contracts out of a bad⁵⁹ bilateral contract.

Initially, it should be noted that the two general rules previously enunciated also apply here.⁶⁰ The leading case of *Chicago & Great*

because the plaintiff has not made the promise requested. In addition the plaintiff's statement could be considered a rejection of the defendant's offer.

55. See note 48 supra.

56. 116 Me. 455, 102 Atl. 294 (1917).

57. 10 Fordham L. Rev. 294 (1941).

58. Dean Finn's admonition was to forge good unilaterals out of bad bilaterals where conscience points the way. Here conscience would appear to point the way, since the defendant got all that he asked for in terms of promise, and probably more than he asked for in terms of performance. It would appear to be equally unfair to say that the defendant's promise should be enforceable as soon as the plaintiff has made the illusory promise on the theory that he has performed as soon as he made the promise. Finn, *The Forging of Good Unilaterals Out of Bad Bilaterals*, 3 Brooklyn L. Rev. 6 (1933).

59. The discussion will show that the word bad is used in the same sense as it was used in note 22 supra. Whether one contract or a series of contracts will be forged depends upon whether the bad agreement was entire or divisible. 1 Williston §§ 49, 860A.

60. This refers to the two general rules set forth in Part I of this article.

*E. Ry. v. Dane*⁶¹ clearly establishes that before a series of contracts can be forged out of a bad bilateral contract the offeree must make the promise requested. In that case, the defendant made an offer to transport a load not exceeding 6,000 tons, upon stated terms. The plaintiff assented to the agreement. Subsequently, the plaintiff tendered freight, and the defendant refused to accept it. The court held that since defendant's offer⁶² looked to one bilateral contract, and the plaintiff failed to make the promise requested,⁶³ there was no bilateral contract and there was no possibility of forging a series of good contracts.

This case should be contrasted with the equally well-known case of *Great Northern Ry. v. Witham*.⁶⁴ In that case, the defendant offered to supply to the plaintiff "such quantities as your storekeeper may order from time to time" at stated prices. The plaintiff answered and stated that he "accepted" and, subsequently, submitted an order before any revocation on the part of the defendant. The court held that the defendant's communication was an offer looking not to one contract,⁶⁵ but to a series⁶⁶ of contracts.⁶⁷ It held further

Since no important case has been found turning upon the second of these rules, it will not be mentioned further.

61. 43 N.Y. 240 (1870).

62. The defendant's communication was not too indefinite to be an offer because it required such definite terms in the acceptance, that the promises and performances to be rendered by each party are reasonably certain. Restatement, Contracts § 32 (1932).

63. The case must be distinguished from cases where an option is given to the promisor or promisee to specify quantity between certain fixed limits during a certain period after his acceptance. *Farquhar Co. v. New River Mineral Co.*, 87 App. Div. 329, 84 N.Y. Supp. 802 (1903); see 1 Williston §§ 44, 45.

The case should also be compared with cases where the buyer and seller have agreed upon total quantity and also upon the price for each assortment available to the buyer under the agreement. Some courts under such circumstances hold that there is a contract prior to specification. See *William Whitman & Co. v. Namquit Worsted Co.*, 206 Fed. 549 (D. R.I. 1913); *Windsor Mfg. Co. v. S. Makransky & Sons*, 322 Pa. 466, 186 Atl. 84 (1936). Other cases take the opposite view and conclude that such an agreement results in a bad bilateral agreement because the agreement is too vague and indefinite. *Wilhelm Lubrication Co. v. Bratrud*, 197 Minn. 626, 268 N.W. 634 (1936). Since the court in the *Wilhelm* case decided that the agreement was severable and since the buyer made the promise requested of him, it is possible that an order by the buyer with respect to a severable part of the agreement within a reasonable time after the void agreement could have resulted in the forging of a good contract. See notes 59 supra, 67-70 infra.

64. L. R. 9 C.P. 16 (1873).

65. As in *Chicago & Great E. Ry. v. Dane*, 43 N.Y. 240 (1870).

66. "An offer may propose the formation of a single contract by a single acceptance or the formation of a number of contracts by successive acceptances from time to time." Restatement, Contracts § 30. (1932).

67. Actually this case involves an offer looking to a series of bilateral contracts.

that the attempted "acceptance" had no effect.⁶⁸ However, the offer continued; therefore, when the plaintiff submitted an order prior to a revocation by the defendant, a binding contract arose.⁶⁹

This case serves to explain what is meant by an offer looking to a series of contracts, but it does not involve the problem of forging a series of good contracts out of a bad bilateral contract.

The leading case of *Rubin v. Dairymen's League Co-op. Ass'n*⁷⁰ will serve to illustrate this process. In that case, the defendant agreed to appoint the plaintiff as his exclusive agent within a certain territory in exchange for the plaintiff's promise to develop a market for the defendant's products.⁷¹ However, since no time was stated for the duration of the agreement, the court held that this was an agreement terminable at will.⁷² The court also held that although the defendant could terminate the agreement as to the future, it would be required to pay for the services rendered according to the contract rate.⁷³

Thus, it would appear that where there is a void bilateral contract but the offeree has made the promise requested, a series of detri-

That is, when the plaintiff orders, although he performs an act, he impliedly promises to pay. Each time he does this and the defendant ships as he already promised, there is a separate and distinct bilateral contract. This is different from a case such as *Offord v. Davies*, 12 C.B. (n.s.) 748, 142 Eng. Rep. 1336 (1862), where there was an offer looking to a series of unilateral contracts. Since the distinction between an offer looking to a series of bilateral contracts, and one looking to a series of unilateral contracts does not appear to be important in relation to the subject under discussion, it will not be adverted to further.

68. That is to say, since the offer looked to a series of contracts, the alleged "acceptance" without ordering any quantity was a nullity. 1 Corbin § 145.

69. In other words, an offer looking to a series of contracts may be revoked at any time, but not as to any contract in the series which has come into being.

70. 284 N.Y. 32, 29 N.E.2d 458 (1940).

71. Thus, there is no question of implying a promise here as in the case of *Wood v. Lucy, Lady Duff-Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917).

72. This is in accord with the general rule that an agreement which does not state any particular time is prima facie terminable at will. 1 Williston §§ 38, 39.

73. See note 74 infra.

73. Clearly the court is forging a series of contracts out of a bad bilateral contract. The bilateral contract is bad for indefiniteness. Yet, the plaintiff is given a contractual recovery for what was done. As is true of all offers looking to a series of contracts, the offeror may revoke as to the future. See note 69 supra. The same process may obviously also occur where an agreement relating to goods instead of services is indefinite. *Red Wing Shoe Co. v. Shepherd Safety Shoe Corp.*, 164 F.2d 415 (7th Cir. 1947). No case has been found in this area which raises problems precisely similar to those raised by *Strong v. Sheffield*, 144 N.Y. 392, 39 N.E. 330 (1895). That is to say, because of the illusory nature of the promise requested from the plaintiff, it is impossible to state whether plaintiff's performance meets the terms of the defendant's offer. See Part I C supra.

mental acts or promises pursuant to the agreement may⁷⁴ give rise to a series of contracts out of a bad bilateral contract.

However, there is at least one leading New York case⁷⁵ which is usually discussed under the heading of requirements contracts⁷⁶ which violates this doctrine. The case referred to is *Nassau Supply Co. v. Ice Serv. Co.*,⁷⁷ wherein the signed agreement entered into on March 21, 1924 was as follows:

Witnesseth—that for and in consideration of the mutual agreements herein contained the Ice Service Co. Inc. hereby agrees to sell . . . to Nassau Supply Co., . . . one hundred tons of ice each day . . . at \$2.50 per ton, and the said Nassau Supply Co., Inc., hereby agrees to purchase from the said Ice Service Co., Inc., all the ice used by them up to (100) one hundred tons. Payments for same daily from May 1st, 1924, to April 30, 1925.⁷⁸

The agreement was signed by both parties. In June of 1924, the plaintiff ordered ice pursuant to the agreement before any revocation by the defendant. The court, contrary to the majority view,⁷⁹ found that there was in fact no consideration,⁸⁰ or that the agreement was too vague and indefinite,⁸¹ and that therefore there was a void bilateral contract. Consequently, plaintiff could not recover for defendant's

74. See note 59 supra.

75. *Oscar Schlegel Mfg. Co. v. Peter Cooper's Glue Factory*, 231 N.Y. 459, 132 N.E. 148 (1921). This case appears to make the same error as the *Nassau Supply Co. v. Ice Serv. Co.*, 252 N.Y. 277, 169 N.E. 383 (1929). However, there is one theory upon which the case might possibly be defended which cannot apply to the *Nassau* case. It is arguable that the defendant in the *Schlegel* case makes an offer looking to one bilateral contract. That he impliedly requested a promise by the plaintiff to buy his requirements only from the defendant and that plaintiff's "acceptance" did not amount to such a promise. Under this interpretation, the case is similar to the case of *Chicago & Great E. Ry. v. Dane*, 43 N.Y. 240 (1870). That is the case where the bilateral is "bad" because the plaintiff did not make the promise requested by defendant; therefore, no question of forging a good unilateral contract out of a bad bilateral contract arises. The interpretation of the case suggested above is not believed by the author to be the true interpretation of the case. This need not be pursued further, for absent this interpretation this case commits the same error as does the *Nassau Supply* case. See also note 63 supra.

76. 1 Williston § 104A.

77. 252 N.Y. 277, 169 N.E. 383 (1929).

78. *Id.* at 279, 169 N.E. at 384.

79. The majority view is that the promise to buy only from defendant is sufficient consideration. 1 *Corbin* § 156.

80. The court admits that there was in theory consideration but in fact none, because the plaintiff was not in the ice business and had no requirements for ice. Under the majority view, as stated in note 79, supra, plaintiff's promise to buy only from the defendant is sufficient consideration.

81. Under the majority view the agreement is sufficiently definite. 1 *Williston* § 104A.

refusal to fill his (plaintiff's) order. Assuming that the court was correct in concluding that the bilateral contract was void, should not the court then have considered the question of forging a series of good contracts out of a bad bilateral contract?

Here, as in the *Rubin* case, there was a void bilateral contract; here the plaintiff submitted a detrimental order pursuant to the terms of the contract and the agreement appears to be divisible;⁸² here the revocation occurred only after the order had been given. It is respectfully submitted that the court of appeals should have held that the order gave rise to one in a series of possible contracts, but that defendant's revocation prevented further contracts from arising.⁸³

CONCLUSION

The existence of a void bilateral contract, followed by performance pursuant to the terms of the void agreement, raises the problem of forging a good unilateral contract out of a bad bilateral contract, or the related problem of forging a series of good contracts out of a bad bilateral contract.

The forging should take place only if the rules set forth herein have been satisfied. The case of *Strong v. Sheffield*⁸⁴ is wrong in stating as a universal proposition that "the consideration is to be tested under the agreement and not by what was done under it."⁸⁵ The case was probably correctly decided upon its facts, since, undoubtedly, the plaintiff failed to make the counterpromise requested by the defendant. It would also appear that the *Nassau Supply*⁸⁶ case was incorrectly decided, even if it be assumed provisionally that there was a bad bilateral agreement.

If the simple rules and distinctions drawn herein are kept clearly in mind by the bench and the bar, it is hoped that there will be less confusion and greater harmony in the decided cases.

82. See note 59 supra.

83. See note 69 supra.

84. 144 N.Y. 392, 39 N.E. 330 (1895).

85. Id. at 396, 39 N.E. at 331.

86. *Nassau Supply Co. v. Ice Serv. Co.*, 252 N.Y. 277, 169 N.E. 383 (1929).

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