CONTRACTS—CONSIDERATION—GENEROUS WARTIME PROMISE ENFORCED AS UNILATERAL CONTRACT. On October 1, 1940, the following editorial appeared in the Sharon Herald.

> The Coca-Cola Bottling Co., Inc. of Sharon to-day took a place among the outstanding firms of the Shenango Valley. William Feinberg, Manager, announced that any employee called to the colors through the conscription law will not lose a cent in wages. The company is prepared to pay the difference between the government wages and the amount the employee received before he went to camp.

The editorial offer was repeated by the manager of the corporation before the plaintiff and other employees and was affirmed by the Board of Directors. Plaintiff was employed by defendant at the time of the offer, and remained with the defendant for the next two years; then, having received notice to report for his selective service physical examination, he enlisted in the United States Coast Guard. After thirty-seven months of service he returned to the Coca-Cola Company for two more years, and at the end of this period resigned and began this action of assumpsit to recover his employer's promised subsidy. On appeal the court affirmed pudgment for plaintiff holding that the employer was obligated by his promise to pay the employee for his pecuniary loss incurred during his term of service.[1]

The court's reasoning drew no distinction between voluntary enlistment and conscription though the latter was originally specified in the newspaper editorial.[2] The appellant's principal objection to the finding of contract was founded on absence of consideration. This question was resolved in the plaintiff's favor by a finding that a forbearance on his part was exercised when he remained for two years in defendant's employ under the influence of defendant's offer.[3] Judicial notice was taken of the fact that a large number of lucrative war-created jobs were available at the time. The court assumed that this forbearance was asked by the defendant as the price for its promise to pay the proposed subsidy and that a valid unilateral contract thereby was created.[4]

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1. Mickshaw v. Coca-Cola Bottling Co., Inc. of Sharon, Pa., 166 Pa. Super. 148, 70 A.2d 467 (1950).
2. *But see* RESTATEMENT, CONTRACTS § 24, comment (a), and § 19 (1932).
3. No attempt is made to treat plaintiff's act of enlistment as the consideration for defendant's promise.
4. 166 Pa. Super. 148, 70 A.2d 467, 468 (1950). The court early regards

The court in the instant case was faced with the vexing distinction between a gratuitous promise and a legally enforceable contract. The difference between the two rests upon the presence or absence of consideration. To support its finding of consideration the court cites two British cases.[5] However, the act which constituted consideration in each British case was the offeree's enlistment in the armed forces; thus they are not authority for the proposition expounded by the court in the present case.[6]

The court refers the meaning of consideration to Section 75 of the Restatement of the Law of Contracts.[7] Assuming that the other elements essential to the Restatement's definition are present, there is no evidence in the opinion of the appellate court that plaintiff's act was bargained for and given in exchange for defendant's promise, *i.e.*, that the promise was given to induce plaintiff's forbearance or that plaintiff remained with defendant because of defendant's promise. The bargaining is taken for granted by the court.[8] Such an assumption is unwarranted under the strict definition of consideration incorporated in the Restatement.[9] Thereunder the parties must agree that a specific

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this transaction as a unilateral contract. However, it does not specify the time at which the plaintiff accepted defendant's offer.

5. Budgett v. Stratford Cooperative and Industrial Society, 32 T.L.R. 378 (1916); Davis v. Rhondda District Urban Council, 87 Law Journal Rep. (K.B. Div.) 166 (1915).

6. The court cites no parallel case in Pennsylvania or in any other jurisdiction in the United States.

7. RESTATEMENT, CONTRACTS § 75 (1932):

(1) Consideration for a promise is
   a. an act other than a promise, or
   b. a forbearance, or
   c. the creation, modification or destruction of a legal relation, or
   d. a return promise,

bargained for and given in exchange for the promise.

8. "It may very well be supposed—without in the least impairing the motives of the appellant in making the offer or of the appellee in enlisting—that some part of the acts and forbearances mentioned was bargained for and given in exchange for the promise made." 166 Pa. Super. 148, 70 A.2d 467, 469 (1950).

9. See note 7 *supra*. Fink v. Cox, 18 Johns. 145, 9 Am. Dec. 191 (N.Y. 1820); Pershall v. Elliott, 249 N.Y. 183, 163 N.E. 554 (1928). In Wisconsin and Michigan Railway v. Powers, 191 U.S. 379 (1903), Mr. Justice Holmes expressed the concept in the following language: ". . . the other elements are that the promise and the detriment are the conventional inducements each for the other. No matter what the actual motive may have been, by the express or implied terms of the alleged contract, the promise and the consideration must purport to be the motive each for the other, in whole or at least in part. It is not enough that the promise induces the detriment or that the detriment induces the promise, if the other half is wanting."

consideration shall be the price for a definite promise, and a bargain relationship must exist. The fact is that the court has not interpreted Section 75 correctly. A prerequisite to valid consideration as therein defined, bargaining, is lacking since there never was a contractual understanding reached between these two parties. As explained by Cardozo, J.:

> The fortuitous presence in the transaction of some possibility of detriment latent but unthought of is not enough (to constitute consideration).[10]

Defendant simply made a promise unsupported by consideration as so defined.

Two possible explanations for the courts' reasoning can be found through a review of the Pennsylvania cases on the subject of consideration. They are both related to the fact that Pennsylvania courts have had a broader conception of consideration than that codified in the Restatement. First, within the scope of this larger conception, Pennsylvania courts have, at times, included promissory estoppel as defined in the Restatement Section 90.[11] They have characterized such estoppel in terms of consideration. But these terms are obviously not synonymous. However, since their functions have been to achieve identical results, *i.e.*, the enforcement of the alleged contract, they have been considred complementary. Their product being identical, their separate boundaries have not been precisely drawn.[12] The Restatement, on the other hand, has arranged consideration and promissory estoppel into two distinct and mutually exclusive categories, the former with the bargaining requirement included under the

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See Corbin, *Recent Developments in the Law of Contracts*, 50 HARV. L. REV. 449 (1937). On the general topic of consideration see Ames, *Two Theories of Consideration*, 12 HARV. L. REV. 515 (1899), 13 HARV. L. REV. 29 (1899); also Corbin, *Mr. Cardozo and the Law of Contracts*, 52 HARV. L. REV. 408 (1939); Wright, *Ought the Doctrine of Consideration Be Abolished from the Common Law*, 49 HARV. L. REV. 1225 (1936).

10. McGovern v. New York, 234 N.Y. 377, 138 N.E. 26 (1923).

11. RESTATEMENT, CONTRACTS § 90 (1932).

"A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee, and which does induce such action or forbearance is binding if injustice can be avoided only by enforcing the promise."

12. Presbyterian Board of Foreign Missions v. Smith, 209 Pa. 361, 58 Atl. 689 (1904); In re Converse's Estate, 240 Pa. 458, 87 Atl. 849 (1913); Langer v. Superior Steel Corp., 105 Pa. Super. 579, 161 Atl. 571 (1932); University of Pennsylvania's Trustees v. Coxe's Exrs., 277 Pa. 512, 121 Atl. 314 (1923); Riegel v. Haberstro, 151 Pa. Super. 539, 30 A.2d 645 (1943); Thompson v. McEalerney, 82 Pa. 174 (1876); Rerick v. Kern, 14 S. & R. 267, 16 Am. Dec. 497 (Pa. 1826).

formal head of "consideration" and the latter under the title "informal contracts *without* assent or *consideration.*" The Pennsylvania court, apparently under the influence of the confused concepts of prior cases, missed the Restatement's distinction and relied upon Section 75 in the belief that it was as broad in scope as Pennsylvania's traditional view that "conideration" can comprehend what is more precisely known as "promisory estoppel." There is, however, no mention of promissory estoppel in the *Mickshaw* opinion.[13]

A second and more probable explanation for the court's misuse of Section 75 is found in the different degrees of importance which the Pennsylvania courts and the Restatement have placed upon the "bargain" requirement. This element in the formation of a contract has been emphasized by the Restatement.[14] Pennsylvania courts prior to the Restatement have given this requirement a position of only minor, if any, importance.[15]

These two possible explanations for the court's misconstruction of Section 75 are pointed up in *Langer v. Superior Steel Corp.*[16] This case presented the question as to whether the promse of an old age penson made by the president of the corporation upon the retirement of an employee constituted an enforceable contract. Judgment was given for the employee. The reasoning of the court rested upon alternative grounds. Either the employee's

13. A number of Pennsylvania cases have employed promissory estoppel in analogous situations involving promises of bonuses. These cases might have supplied convincing authority for the court's conclusion. Langer v. Superior Steel Corp., 105 Pa. Super. 579, 164 Atl. 571 (1932), *reversed on other grounds*, 318 Pa. 490, 178 Atl. 490 (1935), see note 16 *infra*; In re Trexler's Estate, 27 Pa. D. & C. 4, 17 LEHIGH Co. L. J. 410 (1936). See also Scholl v. Hershey Choc. Co., 71 Pa. Super. 244 (1919); Snyder v. Hershey Choc. Co., 63 Pa. Super. 528 (1916). It would seem by these cases that the court could have found support for its conclusion. Emotionally the coloration of injustice grows deeper when it is known that the Coca-Cola Company received much favorable publicity from its promise. It would certainly seem unjust to allow them to repudiate their own voluntary proposal. This bias seems to have weighed heavily with the court in the instant case.

For general discussion on promissory estoppel see Boyer, *Promissory Estoppel: Requirements and Limits of the Doctrine*, 98 U. OF PA. L. REV. 459 (1950).

14. RESTATEMENT, CONTRACTS § 75, Comment (b) (1932) "Consideration must actually be bargained for as the exchange for the promise. A statement that a consideration has been bargained for does not conclusively prove the fact. . . ."

15. Rathfon v. Locher, 215 Pa. 571, 64 Atl. 790 (1906); Western Savings and Deposit Bank v. Sauer, 343 Pa. 332, 22 A.2d 727 (1941).

16. 105 Pa. Super. 579, 164 Atl. 571 (1932), *reversed on other grounds.* (president's act ultra vires) 318 Pa. 490, 178 Atl. 490 (1935).

failure to get a new job constituted consideration or his reliance upon the payments (made by the corporation for four years) created sufficient basis for the use of promissory estoppel as defined in Section 90 of the Restatement. The first stated alternative is subject to the same criticism as the instant case in so far as absence of the bargain requirement is concerned. It will be noted that the boundaries between Section 90 and Section 75 are blurred if, indeed, ascertainable at all in the *Langer* case.

Pennsylvania courts generally, as in the present instance, have at least nominally adopted the Restatement of the Law of Contracts. However, in the *Mickshaw* case the court has misconstrued Section 75 and ignored Section 90. It may have come to a correct conclusion, but only in spite of the Restatement section upon which it purports to rely. The transaction presents a clear situation in which to argue plausibly for the application of the Restatement concept of promissory estoppel. The promisor's statement may have induced reasonable reliance by the promisee —a matter of evidence—and injustice can perhaps be avoided only by enforcing the promise. Although the court could have reached the same result under Section 90, its present unhappy construction of the Restatement creates unfortunate confusion, and the purpose of the Restatement ". . . to promote the clarification and simplification of the law . . ." here remains unattained.[17]

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THE PART OF THE LEGISLATURE IN DETERMINING THE QUALIFICATIONS FOR ADMISSION TO THE BAR.—Until recent times the courts had consistently held that the judicial branch of government should have the sole power to admit attorneys to the bar. The legislature, employing its police power, could prescribe reasonable requirements for the protection of the general public, but the courts had the ultimate power to grant or deny licenses to practice law. Recently, however, the legislatures of many states have attempted to play a more significant role in prescribing qualifications requisite to admission to the bar. Typical was a recent Idaho statute:

> . . . the following applicants *shall* be admitted as attorneys and counselors in all courts of this state without being re-

17. RESTATEMENT, CONTRACTS p. IV (1932).