# **ARTICLE: Origins of Promissory Estoppel: Justifiable Reliance and Commercial Uncertainty Before Williston's Restatement**

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**Text**

**[\*500]** I. Introduction

Between the early 1860s and the 1926 proposal for a promissory estoppel section in the Restatement of the Law of Contracts (Restatement), American courts, with some regularity, granted justifiable reliance relief on commercial promises designed to adjust to uncertain conditions. While some commentators overlooked, or chose not to acknowledge, these early commercial reliance-based decisions, other writers forthrightly rejected the doctrinal propriety of allowing recovery. The denial that nineteenth century courts had bound commercial promisors on the grounds of justifiable reliance reflected the conventional belief that the origins of justifiable reliance relief resided in nineteenth century hardship decisions involving gratuitous promises.

Contrary to that accepted account, the following legal history of the justifiable reliance doctrine documents that courts regularly granted commercial promisees relief from reliance hardship for many decades prior to the first Restatement. More often than not, these reliance-based decisions provided a means to overcome doctrinal obstacles to enforcement of novel promises crafted to deal with uncertain economic conditions. Much has been written about the development of justifiable reliance relief subsequent to Williston's inclusion of a promissory estoppel section in the Restatement; however, except for the generalizations of the authors of the Restatement, or restaters and their contemporaries, surprisingly little legal history has been written about the development of the justifiable reliance doctrine prior to the Restatement.

The story begins around the early 1860s as business planners found it increasingly necessary to incorporate greater flexibility into their agreements to contend with economic unpredictability in the context of longer-term relationships. Promissory innovations in the form of open-ended language, unilateral contract offers, at-will relations, and the more frequent need to modify contract terms butted up against traditional contract doctrine developed during earlier, more static times. Strict common law demands for **[\*501]** definiteness, mutuality, reciprocity of bargain and the related preexisting duty rule scuttled attempts for more malleably structured agreements.

Mounting cases of reliance harm, caused by doctrinal barriers to these unorthodox arrangements, stimulated nineteenth century courts to ameliorate the harshness otherwise generated by traditional rules applicable to contract formation, modification, and termination. Courts justified granting reliance relief through extensions of theories found both at law and in equity; the theories in support of this relief were typically an admixture of legal and equitable notions. Archaic principles opposed to flexible promises fueled growth in the role of justifiable reliance in overcoming resultant unfairness. Justifiable reliance recovery would be a harbinger of twentieth century reforms of some aspects of the inflexibility of formal doctrine.

This study of the commercial roots of promissory estoppel begins in Section II with an extension of this Introduction as a means to furnish background regarding the early sources of the justifiable reliance principle existing at law and in equity prior to the mid-nineteenth century. Section III focuses on Williston's justifications, and the constraining consequences thereof, for the Restatement's sections on bargain consideration and promissory estoppel. Section IV provides evidence, contrary to Williston's claims, regarding the types of transactions in which justifiable reliance recovery was available during the seven or so decades prior to the first Restatement. Williston's denial that commercial reliance relief had previously been given has had a dampening effect on justifiable reliance relief to this very day. The present examination is comprised of case law analysis of reliance recovery granted on commercial promises from around 1860 until Williston unveiled the promissory estoppel section in 1926. These commercial promises were structured to deal with uncertainty in forms incompatible with principles applicable to offer and acceptance and to contract modification. Section IV addresses the obstacles found in the doctrines of offer and acceptance and of consideration to enforcement of offers that were unilateral, indefinite, or at-will. The enforcement of contract modification promises is also examined in Section IV. **[\*502]**

II. Background: Early Sources of Justifiable Reliance

As background to this study, a few brief observations will be provided regarding the roots of promisors' liability for induced justifiable reliance. These early sources found at law and in equity are not presented here necessarily as the direct progenitors of mid-nineteenth century reliance decisions; rather they demonstrate that support for the justifiable reliance impulse did not appear in a vacuum. Reliance hardship relief had been provided for centuries; the early decisional sources at law and in equity were available to the courts of the second half of the nineteenth century and that contributed to the evolution of what became the American doctrine of justifiable reliance. The coalescence of reliance strands from law and equity would ultimately result in the emergence of a third ground for promissory liability to stand alongside the bargain test and the moral obligation principle. [[1]](#footnote-2)1

Common law reliance sources date back to at least the end of the fifteenth century as a part of the genesis of assumpsit, which appears soon thereafter in assumpsit's test for liability known as consideration. Assumpsit's original role afforded the plaintiff a remedy for harm suffered in reliance on a promise much like promissory estoppel does today. In time, consideration would explain the motive that induced the promisee to rely. [[2]](#footnote-3)2 The tortious **[\*503]** notion that reliance, which results in loss, induced by a promise ought to be remedied may have been borrowed from church courts by both chancery and common law courts. The ecclesiastical action fidei laesio was available when a promisee reposed trust in a promisor by reliance and then was later deceived by promisor's breach of faith. [[3]](#footnote-4)3 By the mid-sixteenth century, assumpsit began to take on a contractual character as it made inroads on the reciprocal sphere of the bustling action of debt. [[4]](#footnote-5)4 As assumpsit was converted into a contract action, the detriment suffered by the deceit became subsumed within the doctrine of consideration [[5]](#footnote-6)5 until its original reliance character was resuscitated in the eighteenth century. [[6]](#footnote-7)6

Early in the eighteenth century, Holt, C.J. resurrected assumpsit's reliance origins in tort in Coggs v. Bernard [[7]](#footnote-8)7 when he ruled that a negligent bailee was liable in assumpsit on account of a bailor's justifiable reliance. [[8]](#footnote-9)8 Later in the eighteenth century, **[\*504]** Wilmot, J.'s dictum, while a member of the Mansfield court, extended Holt's reliance notion to a commercial undertaking in Pillans v. Van Mierop. [[9]](#footnote-10)9 While a reporter's case note to Pillans attributed Coggs v. Bernard to be authority for the reliance relief, [[10]](#footnote-11)10 Justice Wilmot's opinion justified reliance hardship relief on the ground of natural law. [[11]](#footnote-12)12 soon suppressed the Mansfield court's flexible application of the doctrine of consideration though it did not address Wilmot's dictum. [[12]](#footnote-13)13 The decision in Rann signaled the **[\*505]** onset of a formalist English common law reaction against Mansfield's liberalization of the doctrine of consideration that Mansfield had orchestrated through his borrowing of Continental ideas to accommodate contractors' reasonable expectations. [[13]](#footnote-14)14 Whether through inadvertent misapplication of the law or deliberate choice, eighteenth century precursors of the change to come in the next century had been introduced to answer the need for fairness.

In the United States, early republican attraction to natural law ideas found support in American case law and thought during the nineteenth century. [[14]](#footnote-15)15 During a later formalist period in the United States, Langdell and Holmes railed against reliance-based deviations from the bargain model found in cases like Pillans and Coggs. [[15]](#footnote-16)16 Nevertheless, the equitable results, effectuated with the support of tort and natural law ideas, continued to be realized in the case law during the half century prior to the first Restatement. [[16]](#footnote-17)17 At the time proposed section 90 to the Restatement was under consideration, a 1927 dissenting opinion in a New York charitable subscription case pointed out that a "so-called 'promissory **[\*506]** estoppel'" was not novel since Mansfield's court had found it sufficient in Pillans. [[17]](#footnote-18)18

As an aside, on the subject of the influence of charitable subscription decisions on the emergence of justifiable reliance relief, Williston attributed great importance to the role of this genre of cases, [[18]](#footnote-19)19 but the case law indicated otherwise. Cases of reliance on charitable subscriptions fit into a sui generis policy category that had little impact on the growth of justifiable reliance outside charitable and family gift cases, with the occasional exception of decisions on community-based business subscriptions. [[19]](#footnote-20)20 Early decisions on charitable subscriptions and family gift promises offered perhaps the best examples of pure justifiable reliance logic at work because manipulation of consideration was generally out of the question for these gratuitous promises. However, virtually none of the commercial reliance decisions discussed in this study cited gift promise cases as authority; this was true whether the commercial promise was found binding on the basis of an independent ground of justifiable reliance or on a declaration of sufficient consideration.

Turning to the equity side, chancery had granted reliance relief since at least the fifteenth century. [[20]](#footnote-21)21 The origins of this hardship relief resided in chancery's avoidance of the equitable **[\*507]** fraud, and possible tort, that would occur if a promisor insisted upon the strict application of contract doctrine after having induced promisee's justifiable reliance. The direct equity source drawn upon in American decisions was the reliance factor found in the part performance exception to the statute of frauds writing requirement for a contract to transfer an interest in land. [[21]](#footnote-22)22 As discussed below, the wide acceptance of this equitable exception for part performance in reliance on an oral promise generated common law extensions that granted reliance relief on commercial contract modifications, at-will business licenses, distributorships, and indirectly on unilateral [[22]](#footnote-23)24 commercial promises. [[23]](#footnote-24)25 The part performance doctrine appeared in the late seventeenth century, less than a decade subsequent to the passage of the statute of frauds. [[24]](#footnote-25)26 The defense of lack of a writing was characterized as an equitable fraud when the defense was raised after an oral promise had induced reliance hardship in the form of taking possession and part payment or improvements. [[25]](#footnote-26)27 By the **[\*508]** nineteenth century, the promisor was said to be estopped from raising the defense once reliance on the oral promise had occurred. [[26]](#footnote-27)28

Extensions of the equitable part performance exception to the statute of frauds to promises for contract modifications and for at-will business licenses were stimulated by a pair of Pennsylvania decisions rendered in 1818 and 1826, both of which enforced promises for revocable land licenses on reliance grounds. [[27]](#footnote-28)29 In the 1818 case, Le Fevre v. Le Fevre, the court drew an analogy to part performance of an oral contract falling under the statute of frauds. [[28]](#footnote-29)30 The court concluded it would be a fraud for a defendant landowner to revoke the plaintiff's license after the defendant's request for a modification had induced the plaintiff's change of position. [[29]](#footnote-30)31 Chancellors at the time of the case saw it to be a part of their office to protect one who trusted another's word when knowledge existed that trust was being reposed. [[30]](#footnote-31)32 Twelve years later, Le Fevre's disposition of the land license modification was adapted to a commercial construction contract modification in the influential Massachusetts decision Munroe v. Perkins. [[31]](#footnote-32)33 The Massachusetts court declared that enforcement of the original contract would be a fraud on the plaintiff who had been induced by the modification promise to complete performance. [[32]](#footnote-33)34 Munroe would be widely cited **[\*509]** during the rest of the nineteenth century in support of contract modifications relied upon. [[33]](#footnote-34)35

The other Pennsylvania land license decision rendered in 1826, Rerick v. ***Kern***, [[34]](#footnote-35)36 acted as a catalyst for sympathetic treatment of reliance upon at-will business license agreements in Pennsylvania. [[35]](#footnote-36)37 A landowner revoked a land license after the plaintiff had relied by building a mill, and the court declared that if the enjoyment of a revocable license "must necessarily be preceded by the expenditure of money," an attempt to revoke thereafter was precluded. [[36]](#footnote-37)39 contracts writer Parsons cited Rerick for the proposition that reliance in equity sometimes performed the role of consideration. [[37]](#footnote-38)40 At the turn of the twentieth century, the Pennsylvania decision Harris v. Brown [[38]](#footnote-39)41 extended the Rerick line of land license decisions to a case in which reliance costs necessarily had to be incurred before a revocable license to use a **[\*510]** business trade name could be enjoyed. [[39]](#footnote-40)42 Then in 1925, the "rule in Harris v. Brown" would be applied to enforce a promise for a revocable business distributorship on similar reliance facts. [[40]](#footnote-41)43 The Pennsylvania courts' treatment of at-will business distributorships and licenses would be noted by the drafters of the first Restatement, [[41]](#footnote-42)44 but that influence would be indirect elsewhere since it was cited as persuasive authority in only a few jurisdictions outside Pennsylvania. [[42]](#footnote-43)45

III. Williston's Generalization and Its Impact

The American Law Institute (ALI) was formed in February 1923 for the stated purposes of being "primarily directed to the clarification and simplification of the law and its better adaptation to the needs of life." [[43]](#footnote-44)46 Thus began a process modeled on the civil law practice of academics drafting legislative solutions. Samuel Williston (Williston), a member of the ALI's Inaugural Council, was selected as Reporter for the contracts project becuase he was characterized as "the unquestioned authority on the subject" and "anxious" to undertake the project. [[44]](#footnote-45)47 It was asserted that a restatement of contract law was made simpler thanks to the publication of Williston's four volume contracts treatise two years **[\*511]** earlier. [[45]](#footnote-46)48 Bolstered by the ALI's encomium and the deference accorded his treatise, Williston would overshadow the younger Corbin, the Special Adviser on the drafting committee. [[46]](#footnote-47)49 During the succeeding generation, Williston's treatise would become the most influential American contracts treatise since the publication of Parsons' treatise in 1853. [[47]](#footnote-48)50

A. Holmes' Notions

Williston and his advisors went to work as soon as his mandate took effect in June 1923 and approximately within a year produced a draft of the first seventy-five sections, which ran through the section on the doctrine of consideration. [[48]](#footnote-49)51 When Williston defined consideration in his treatise in 1921, he noted the "difficulty in reducing to one fixed standard" the meaning of consideration because of the "varying underlying bases" of assumpsit over time. [[49]](#footnote-50)52 He observed that what constituted sufficient consideration could be found under the three "distinct and conflicting ideas" of justifiable reliance, bargain, and a slender **[\*512]** reed of moral obligation. [[50]](#footnote-51)53 Despite the alternative bases for finding consideration that treatise writer Williston saw in the case law, Reporter Williston sought out a clear monist principle once he put on his legislative cap; his legislative mind chafed at the alternative propositions of traditional consideration doctrine. [[51]](#footnote-52)54 Legislative formalism distilled a singular principle from the complexity of reasons for promissory liability, to the exclusion of alternative equitable reasons grounded upon the contexts of reliance and moral obligation. [[52]](#footnote-53)55

Williston isolated bargain as the unitary Restatement standard for sufficient consideration. [[53]](#footnote-54)56 Although courts of law and equity had held that justified reliance qualified as consideration as an alternative basis to bargain, comment (c) to section 75 took pages out of Langdell's and Holmes' books in proclaiming that reliance upon a promise could not establish consideration. [[54]](#footnote-55)57 Langdell and, shortly thereafter, Holmes had championed bargain as the sole ground for finding consideration present, to the exclusion of justifiable reliance. [[55]](#footnote-56)58 Despite the contravening case law, it became **[\*513]** convenient for Reporter Williston to adopt bargain consideration in 1925 under the aura of the prominent reputation Justice Holmes had gained by the 1920s. [[56]](#footnote-57)59 Williston noted in 1921 that Holmes was "opposed in principle" to justifiable reliance acting as consideration. [[57]](#footnote-58)60

Holmes enunciated his bargain consideration theory in The Common Law in 1881 with his oft-cited flourish that a "reciprocal conventional inducement" was required between the consideration and the promise. [[58]](#footnote-59)61 Holmes' flirtation, with what would later be labeled Pragmatism, during the preceding decade made him attracted to utilitarian rules responsive to commercial "felt necessities," which he concluded demanded an objective standard based on market reciprocity. [[59]](#footnote-60)62 His sole test for promissory liability **[\*514]** ignored legal history as well as contemporary decisions in denying other sufficient reasons courts had held supported binding promises. A largely overlooked aspect of his commentary regarding the doctrine of consideration was his concerted effort to deny a place for justifiable reliance within the doctrine. Indeed, his fundamental approach in his discussion of consideration was to emphasize the singular bargain standard to the specific exclusion of justifiable reliance. [[60]](#footnote-61)63 This approach may well have been taken from Langdell's similar exclusion of reliance from a place within the promissory test of consideration in Langdell's supplement to his casebook, which Holmes had reviewed the previous year. [[61]](#footnote-62)64

The position taken by Langdell and Holmes was a formalist reaction against the natural law flexibility that had crept into the sphere of promissory liability during the preceding decades. [[62]](#footnote-63)65 While Langdell rejected Pillans v. Van Mierop as a means to **[\*515]** undermine actionability on justifiable reliance, Holmes tried to accomplish the same by focusing on the facts in Coggs v. Bernard, [[63]](#footnote-64)66 the 1703 English case that involved a bailor's reliance on a gratuitous bailee's promise to transport his goods. [[64]](#footnote-65)67 Although consideration had not formerly been required to sustain a bailment, Holt, C.J. ruled in response to a defense of lack of consideration that consideration was present to bind the negligent bailee. [[65]](#footnote-66)68 Until that decision, a bailor could sue a negligent bailee in an action on the case without the need to establish consideration. [[66]](#footnote-67)69 Holt exhumed the tortious reliance origins of early assumpsit actions before assumpsit was converted into a contract action on promises supported by consideration. [[67]](#footnote-68)70 He converted what had traditionally been a tort action for negligent bailment into a contract action requiring consideration. [[68]](#footnote-69)71 Coggs was an anomaly to the cases in which reliance supplied the consideration in the nineteenth century because bailment actions had not called for consideration, unlike cases that had always fallen under the consideration construct. And yet, Holmes presented Coggs as a case representative of **[\*516]** contracts generally and then readily pointed out that it was doctrinally flawed since Coggs was an easy target to undercut. [[69]](#footnote-70)72 Holmes used Coggs to side-step, while still trying to compromise, the raft of nineteenth century American reliance hardship decisions that involved transactions traditionally governed by the doctrine of consideration. [[70]](#footnote-71)73

Holmes was not the only one to blame for Coggs taking on an inordinate importance in American contract law. Much of the responsibility can be laid at the feet of Kent, whose Commentaries Holmes edited in 1873. [[71]](#footnote-72)74 In his Commentaries, Kent emphasized his 1809 decision in Thorne v. Deas, [[72]](#footnote-73)76 In Thorne, Kent, C.J. stated that the consideration requirement in an action against a gratuitous bailee could be fulfilled only by the bailee's misfeasance, as was the case in Coggs. [[73]](#footnote-74)77 Thus, when a gratuitous agent in Thorne promised to obtain insurance to cover a ship on a voyage, he could not be liable for the principal's reliance on his promise since there was only mere nonfeasance of failure to obtain the insurance. [[74]](#footnote-75)78

Kent admitted the greater fairness in the opposing civil law principle, at least in spirit; but in the position in equity, he felt obliged to follow the formal English common law precedent. [[75]](#footnote-76)79 Holt and Kent muddled bailment and agency together with general contract law. Holmes thereafter trumpeted Coggs as the paradigmatic example of the inappropriate recognition in contract law generally of reliance qualifying as consideration. [[76]](#footnote-77)80 Kent and Holmes differed on the place of Coggs under the consideration construct, but each writer's interpretations had a stultifying effect on consensual liability. **[\*518]**

Holmes commenced a crusade against justifiable reliance as a ground for consideration; it would be a theme he returned to throughout much of his professional life. [[77]](#footnote-78)81 In 1881, however, he became tentative about his proposition regarding consideration because he followed his comments about bargain consideration with the qualification: "If the foregoing principle be accepted." [[78]](#footnote-79)82 He had good reason for being unsure of himself because he had no track record as a contracts scholar; [[79]](#footnote-80)83 Holmes formed his contract law notions during a summer in preparation for a lecture series. [[80]](#footnote-81)84 His inaccurate legal history was criticized in contemporary reviews. [[81]](#footnote-82)85 Had Holmes not followed these early speculations with **[\*519]** repetitions of his notions about consideration during his successful judicial career, his bargain ideas would have surely been ignored. [[82]](#footnote-83)86 The claim that bargain was the sole basis to bind a promisor became Holmes' hobby-horse over the next generation in decisions he rendered in both the Massachusetts Supreme Court and the United States Supreme Court.

In the 1901 case of Martin v. Meles, [[83]](#footnote-84)87 Holmes, by then a seasoned state supreme court chief justice, was no longer tentative in stating that a business subscription agreement was not binding unless the reliance pleaded was bargained for. [[84]](#footnote-85)88 Holmes saw the "strongest reason for interpreting a business agreement in the sense which will give it a legal support," but only if the facts conformed to the bargain formula. [[85]](#footnote-86)89 He drew an analogy to successful charitable subscriptions but also noted those subscriptions in which consideration had been found lacking because no new duty was undertaken by the charity. [[86]](#footnote-87)90 He distinguished those subscription promises held unenforceable because the subscribers in Martin had induced the manufacturer's association to change its position to defend their common interest. [[87]](#footnote-88)91 A binding commercial contract was found in their reciprocal interests, but his dictum opposed justifiable reliance if the promisor did not bargain for reliance, though he admitted that some Massachusetts decisions seemed to bind promisors if justifiable reliance was subsequently induced. [[88]](#footnote-89)92 **[\*520]**

Two years later, as a member of the United States Supreme Court, Holmes cited Martin in support of his long-held position that reliance must be bargained for in order to fulfill the requirements of the doctrine of consideration. [[89]](#footnote-90)93 Language was also exhumed from The Common Law that the "promise and the detriment" needed to be the "conventional inducements each for the other." [[90]](#footnote-91)94 Holmes demanded a doctrinal purity that was divorced from what nineteenth century courts had actually been doing in finding consideration in the reliance hardship of commercial promisees. Holmes criticized Langdell for ignoring context by his famous declaration that the life of law had been experience, not logic; [[91]](#footnote-92)95 however, Holmes succumbed to the same formalist trap by preferring logic over experience. [[92]](#footnote-93)96

B. "Promissory Estoppel"

Holmes' judicial rejection of actionable justifiable reliance was out-of-step with contemporary contracts scholars who noted the developments in the case law and commented favorably that reasonable reliance on raised expectations was worthy of protection. Holmes' friend Pollock, the influential English contracts writer, expressed dismay in his treatise and in his correspondence with Holmes regarding dashed expectations caused **[\*521]** by broken promises. [[93]](#footnote-94)97 Pound likewise preferred the standard of realization of reasonable expectations over one grounded on the parties' will or their bargain. [[94]](#footnote-95)98 In Williston's 1906 American edition of Pollock's treatise, Pollock's text stated that a promisor ought to be held liable not merely because of his expressed intent "but because he so expressed himself as to entitle the other party to rely on his acting in a certain way." [[95]](#footnote-96)99 Williston's footnotes to the consideration section of that edition noted that both charitable and business subscriptions had been held binding when a promise induced reliance on the ground of either "good consideration" or "estoppel." [[96]](#footnote-97)100

The opposing views of Holmes' contemporaries were by no means the first observations that accepted the case law developments. Parsons noted for the first time in his third edition in 1857 that reliance was binding in equity in much the same way that consideration operated at law. [[97]](#footnote-98)101 Bigelow acknowledged in 1876 that courts sometimes applied equitable estoppel to a representation which was in reality a promise regarding induced future behavior. [[98]](#footnote-99)103 **[\*522]** provided perhaps an extreme example of how far some nineteenth century courts at law went to rationalize hardship relief for justifiable reliance. The Connecticut court traced consideration back to "its foundations" as a trespassory deceit action. [[99]](#footnote-100)105 but the court's claim that reliance relief for deceit remained available in contract law was a departure from judicial treatment because by the sixteenth century, the deceit element had been subsumed within a modern doctrine of consideration grounded upon reciprocal agreement. [[100]](#footnote-101)106 The opinion in Rice stated that consideration contained "substantial elements of an estoppel" in that "a promise induces another to change his situation; if he is allowed to deny the validity of the promise he is enabled to perpetrate a fraud" by his "false promise." [[101]](#footnote-102)107

Williston and Corbin, soon to be the leading drafters of the Restatement, kept up the criticism of Holmes' denial that justifiable reliance could constitute consideration during the years immediately before formation of the ALI. When Williston published his treatise in 1921, he noted a consideration ground, distinct from bargain, when a promisor aroused expectations in the **[\*523]** promisee and the promisee was thereby induced to act. [[102]](#footnote-103)108 Williston became the first to attach the label "promissory estoppel" to this ground, [[103]](#footnote-104)109 and he observed the "impatience" of American judges in reliance hardship cases with the limiting requirement of bargain. [[104]](#footnote-105)110 Corbin met Holmes' judicial dicta head on in his 1919 American edition of Anson's contract text; Corbin pointed out that Holmes' doctrinal musings were not in concert with the realities in the decisions. [[105]](#footnote-106)111 Corbin, an assiduous student of case law, picked up on Holmes' grudging admission in Martin v. Meles [[106]](#footnote-107)112 that reliance on a promise seemed to sometimes make the promise binding, and Corbin set out a long string of case citations that proved just that. [[107]](#footnote-108)113 In refuting Holmes' monist bargain theory, for which Holmes cited virtually no precedent, [[108]](#footnote-109)114 Corbin pointed to case law holding that relief from reliance hardship suffered by real people, as opposed to Holmes' ethereal world of theory. In a note to American readers of his edition of Anson, Corbin wrote: "Consideration may consist of acts of reliance upon a promise even though they were not specified as the agreed equivalent and inducement." [[109]](#footnote-110)115 Corbin **[\*524]** observed that American courts of law and equity, imbued with natural law ideas, had permitted the scope of consideration to grow; he added that the doctrine's "limits are very broad." [[110]](#footnote-111)116

Notwithstanding the broader consideration grounds found in decisional law, the first Restatement narrowed the definition of consideration exclusively to the bargain standard. [[111]](#footnote-112)117 By specifically excluding justifiable reliance from the proposed restatement definition of consideration, [[112]](#footnote-113)118 the drafters knew they had created a gap through which formerly actionable reliance harm would slip. Thus when the restaters returned to draft the remaining portion of the restatement in 1925, they addressed judicial rulings in favor of promisees on the grounds of justifiable reliance in Restatement sections 85 through 94. [[113]](#footnote-114)119 In early 1926, the restaters disseminated for discussion within the legal profession the proposed separate treatment of the justifiable reliance ground for promissory relief in section 88, [[114]](#footnote-115)120 later renumbered section 90. Section 90 would be approved with the identical verbiage in 1928, and the same version would be adopted in the published Restatement in 1932.

The design of section 90 was influenced by suggestions of academics during the previous fifteen years. The restaters were aware of the academic treatment of reliance-based case law in the **[\*525]** United States during the preceding seven decades, [[115]](#footnote-116)121 but the theory lacked organized structure. Beginning in the first decade of the twentieth century, academic discussions appeared regarding the appropriate design of a more formalized justifiable reliance theory. [[116]](#footnote-117)122 Ashley wrote in 1910 that perhaps equitable estoppel, applicable to factual misrepresentations about the past, could be adapted for justifiable reliance; he acknowledged that this could only be done by analogy since estoppel did not exactly fit promises about the future. [[117]](#footnote-118)123 Williston would introduce the terminology "promissory estoppel" in 1921 to indicate the plaintiff had relied on a promise rather than a misrepresentation of fact. [[118]](#footnote-119)124

Other commentators were opposed to the use of the term estoppel since, as McGovney, Corbin and Pound each said, it stretched the term beyond its meaning, [[119]](#footnote-120)126 Ashley also acknowledged that equitable estoppel was too often dragged in to cover hardship cases with no clear understanding of its meaning. [[120]](#footnote-121)127 The label "promissory estoppel" supplied catchy phraseology for the open recognition of a ground that had largely been smuggled in either under the doctrine of consideration or as a form of equitable relief. Still, it did violate ALI guidelines set for drafters who were charged not to use words "invented to express a legal concept even though there is no single word or expression in general use by the profession to express the concept." [[121]](#footnote-122)128 Moreover, the label was oxymoronic in combining a promise looking to future performance with an estoppel looking to past conduct. In the end, the label promissory estoppel was not used in section 90. Perhaps because Yale law professors McGovney and Corbin were two of the four active members of the Restatement drafting committee, the terminology **[\*527]** "promissory estoppel" did not appear in the 1926 draft, approved in 1928, nor was it used in Restatement (Second) section 90. [[122]](#footnote-123)129

Restatement section 90 reads very much like Corbin's note in his editions of Anson in 1919 and 1924. [[123]](#footnote-124)130 Williston explained to the ALI membership the drafters' conclusion that, "there is a binding thread in all the classes of cases which have been enumerated, namely, the justifiable reliance of the promisee." [[124]](#footnote-125)131 Although Corbin, and in part Williston, treated justifiable reliance as a basis for finding consideration in their writings prior to 1926, [[125]](#footnote-126)132 Williston's conservative inclinations won out in section 90 placing promissory estoppel outside the exclusive bargain test for consideration enunciated in section 75. [[126]](#footnote-127)133 In respect to their comments regarding justifiable reliance prior to 1925, Farnsworth portrayed Williston as more revolutionary than Corbin, because Williston announced an independent ground of promissory estoppel as a "substitute for consideration," while Corbin pointed **[\*528]** to the case law ground for consideration of unbargained-for justifiable reliance. [[127]](#footnote-128)134

Actually, when Williston's treatment of consideration and of promissory estoppel are read together in his 1921 treatise, he offered the alternatives of justifiable reliance as either a basis for consideration or a substitute for consideration. [[128]](#footnote-129)135 In Williston's discussion of promissory estoppel as a substitute for consideration, he appeared to be inclined toward separating justifiable reliance from consideration; in the process, he relegated justifiable reliance to the status of an exception to the bargain principle that would be available only in a narrow range of cases. [[129]](#footnote-130)136 In 1921, Williston was nudging justifiable reliance out of the realm of the doctrine of consideration, and he marginalized it as he inaccurately claimed that reliance relief had been almost exclusively granted on gratuitous promises and waivers. [[130]](#footnote-131)137 That is not to say that Williston was a reactionary on the subject like Langdell and Holmes. Williston had read the case law thoroughly, and suggested promissory estoppel as a ground independent of consideration; but neither admitted the full scope of its application in the case law nor encouraged its growth. Corbin, on the other hand, did not try to constrict the range of justifiable reliance relief to something less than the broader view taken by many courts of law and equity in decisions that held justifiable reliance bound commercial promisors within the mainstream doctrine of consideration. [[131]](#footnote-132)138

Farnsworth's remark that Williston was cautious in drafting section 90, because of pressure from Corbin, does not seem to fit with the fact that Williston's writing before and after the adoption of the first Restatement emphasized factual parameters for promissory estoppel narrower than decisional law. [[132]](#footnote-133)139 In contrast, **[\*529]** Corbin urged courts to apply the doctrine of consideration liberally, as many jurisdictions had done, in order to encompass bargain, justifiable reliance and moral obligation. [[133]](#footnote-134)140 Corbin's position was that the American common law of contract was not what theory might logically dictate it to be but rather was what decisional law declared it was.

Williston's claim that justifiable reliance relief had been primarily given by courts on charitable subscriptions appears in his first recognition of actionable justifiable reliance in a footnote incorporated in his edition of Pollock's text in 1906. [[134]](#footnote-135)141 Williston wrote that charitable subscriptions "anomalously have been held supported by . . . consideration" on the ground of reliance "on the faith of the subscription" or have been enforced without resort to consideration "upon the ground of estoppel." [[135]](#footnote-136)142 In his 1921 treatise, Williston wrote that justifiable reliance had "generally been cases of charitable subscriptions where courts" became "dissatisfied" with "prevailing theories" about consideration. [[136]](#footnote-137)143 In Williston's commentary provided to the ALI in 1926, he wrote, "Charitable subscriptions are generally enforced in the United States at least after action in reliance upon them has been taken," though the reliance is not bargained for, under a theory "I have called in the Treatise 'promissory estoppel.'" [[137]](#footnote-138)144

In reading Williston's remarks regarding charitable subscriptions and other gift promises in 1906, 1921, and 1926, a reader would be led to the conclusion that nearly all reliance decisions fell here, [[138]](#footnote-139)145 which was by no means the case as will be **[\*530]** shown below. [[139]](#footnote-140)146 Furthermore, though it might not have been Williston's intent to do so, one might also be misled to infer, from his overemphasis on charitable subscriptions, that the genesis of justifiable reliance in the United States resided in this category of promises. In fact, charitable subscription was a sui generis category of justifiable reliance cases, and it had negligible, if any, impact on cases involving commercial promises, with the occasional exception of the kindred business subscription. [[140]](#footnote-141)147

In addition to the primacy of charitable promises in Williston's description of justifiable reliance case precedent, Williston set out other categories of gratuitous promises where reliance hardship relief had been provided either under consideration or estoppel. In his 1921 treatise, he included examples of reliance in transactions that did not fit comfortably under the consideration construct to begin with, such as waivers of statutory defenses, marriage settlements, and gift promises regarding land, the last either for conveyance, foreclosure, or license coupled with promisee's possession and improvements. [[141]](#footnote-142)148 Williston then seemed perhaps ready to include cases of binding justifiable reliance on commercial promises by remarking: "In a few cases, however, courts have applied the same doctrine to a promise, between individuals, for payment of money." [[142]](#footnote-143)149 As **[\*531]** authority, however, he cited two gratuitous promise cases and none involving commercial promises. [[143]](#footnote-144)150

Reporter Williston's commentary to the ALI in 1926 included the above examples, found in his treatise, of gifts of land interests, waivers, and marriage settlements, and he added family gifts and gratuitous bailments and options. [[144]](#footnote-145)151 The cases of licenses, easements, and bailments contributed little because none of these had originally been a part of the consideration contract construct, [[145]](#footnote-146)152 and, as Williston had noted about waivers, "no new right is created." [[146]](#footnote-147)153 Of the thirteen factual examples provided in his commentary, only two had commercial possibilities, and the remainder were either gift promises [[147]](#footnote-148)155 Williston's overemphasis on gratuitous promises reflected his mission during this period to find a means to replace the loss of the seal in order to facilitate binding **[\*532]** gift promises; [[148]](#footnote-149)156 the year before, he suggested another cure through his draft of the Uniform Written Obligations Act. [[149]](#footnote-150)157

C. The Restatement's Retardation of Justifiable Reliance

The generalized language in section 90 was open to the possibility of commercial promises being covered; Williston certainly knew that commercial promisees had received reliance relief because many of the unannotated cases included in his treatise's footnotes involved commercial promises. [[150]](#footnote-151)158 Despite the open language in section 90, however, he did not articulate its applicability to commercial promises in his commentary to the ALI nor did he encourage such use in any of his writings. He left the actual scope of section 90 up in the air for the reader of the published version in 1932 since, unlike many of the Restatement's sections, he provided no comments or reporter's notes. [[151]](#footnote-152)159 He claimed that section 90 "states a broader general rule than has often been laid down," [[152]](#footnote-153)160 but, if anything, he discouraged a liberal application of section 90. He dampened expectations by saying that section 90 does not assert a "sweeping rule" that reliance is sufficient support for a promise. [[153]](#footnote-154)161 Williston underlined the restrictions in the Restatement doctrine, such as the need for **[\*533]** reliance to be of a "substantial character" [[154]](#footnote-155)162 and also that only expectation damages should be assessed, to the exclusion of reliance damages. [[155]](#footnote-156)163 The Restatement position on justifiable reliance can be viewed as a formalist retreat from previous expansion of promissory liability grounded upon natural law principles. [[156]](#footnote-157)164 Furthermore, the sheer fact that the Restatement edged justifiable reliance out of the mainstream doctrine of consideration diminished its availability and relegated it to an exceptional equitable role.

Williston was not alone in failing to point to the commercial applications of justifiable reliance. Corbin's description of actionable justifiable reliance prior to the restatement project was certainly broad enough to encompass commercial promises, but even he did not annotate any factual category of promises qualifying for reliance relief beyond gift promises. [[157]](#footnote-158)165 Corbin supported his liberal comments on justifiable reliance by a string of case citations in his editions of Anson, but the only case facts he annotated involved a gratuitous promise of land. [[158]](#footnote-159)166 Corbin's observations obviously did not preclude commercial promise coverage, which coverage he would have been aware of from his citations, but he never spoke in terms of actionable promises being commercial or non-commercial. [[159]](#footnote-160)167 Commentators during the generation subsequent to the adoption of Restatement section 90 corroborated the view that, prior to the Restatement's adoption, justifiable reliance relief had been available almost exclusively for **[\*534]** gratuitous promises and for relations not traditionally covered by the consideration contract; this was the understanding of Shattuck in 1937 [[160]](#footnote-161)169

It was remarkable that judges and writers of that generation made no reference to commercial justifiable reliance decisions rendered during the century prior to the adoption of section 90. Was it lack of historical knowledge or was it a conspiracy of silence among the legal elite in support of the uniformity and clarity attained by a restatement of contract law? [[161]](#footnote-162)170 It was almost as if, at least for a while, the legal profession had treated the body of contract precedent prior to the Restatement to be suspect or wiped clean. Later Gilmore tossed off a sentence that pre-1932 decisions applied consideration more broadly than the bargain test, but he did not supply any case law support except to cite Corbin, and he made no reference to judicial relief granted for justifiable reliance on commercial promises during that period. [[162]](#footnote-163)171 **[\*535]**

In the wake of the publication of the Restatement in 1932, the case reports of the 1930s and 1940s became littered with decisions following the restaters' claim in comment (c) to section 75 that the doctrine of consideration applied to bargain facts to the exclusion of justifiable reliance. [[163]](#footnote-164)172 The broad support within the legal profession for the Restatement project seemed to generate a lack of confidence in courts continuing thereafter to follow their own state's common law if it was inconsistent with Restatement declarations on the contents of what was held out as the true common law. For example, in a pair of exclusive distributorship decisions, judicial opinions expressed reluctance to hold a distributor who relied but did so because of failure to fulfill the bargain requirement. A year after the publication of the Restatement, a federal appellate court in E.I. Dupont De Nemours & Co. v. Claiborne-Reno Co. [[164]](#footnote-165)173 expressed "sympathy" for the reliance theory employed by the lower court because it seemed "fair that, after having spent six years in developing the territory assigned to it, the distributor should have been permitted to continue or should have been compensated for the injury done it by having its business taken away." [[165]](#footnote-166)174 The trial court's treatment of reliance had previously been widely accepted, but the appellate court held that, pursuant to section 75's comment (c), the distributor's reliance could not establish consideration. [[166]](#footnote-167)175 A similar approach was followed in a 1940 federal district court decision that, although the judge was "reluctant" to hold against the exclusive distributor, reliance did not answer the requisite demand of bargain consideration. [[167]](#footnote-168)176 In an opinion devoid of citation to **[\*536]** authority, the district judge lifted language from comment (c) to justify holding against the franchisee. [[168]](#footnote-169)177

In a pair of long-term lease decisions rendered during the generation subsequent to the Restatement, courts likewise refused to find consideration grounded upon justifiable reliance. An Iowa court said in 1934 that reliance did not qualify if plaintiff's expenses "were not incurred at the request of the defendant." [[169]](#footnote-170)178 Even a later champion of justifiable reliance like Justice Traynor invoked comment (c) in his 1942 decision, Bard v. Kent, [[170]](#footnote-171)179 to deny the presence of consideration because the lessor did not bargain for the lessee's reliance. [[171]](#footnote-172)180 In the alternative, Traynor said that no promise was made for application of promissory estoppel despite the fact that the lessee's improvements were made after the owner encouraged the improvements by suggesting an architect to design the improvements and assuring that the lease would be extended for another four years. [[172]](#footnote-173)181 Promissory transactions began to fall through the cracks as the applicability of the doctrines of bargain consideration and promissory estoppel were both strictly construed. Case law examples in other factual circumstances gave reliance similar treatment. [[173]](#footnote-174)182 Williston's constrictions of the now separated doctrines of consideration and promissory estoppel were **[\*537]** taking hold. Some modern writers assert that a similar retreat in the use of promissory estoppel is occurring today. [[174]](#footnote-175)183

Traynor's restrictive application of promissory estoppel in Bard v. Kent reflected the impact of portrayals by Williston and his contemporaries of the limited scope justifiable reliance relief had enjoyed during the century prior to the adoption of section 90. [[175]](#footnote-176)184 This retardation in the actionability of commercial promises on the ground of justifiable reliance is exemplified by the following well-known construction contract bidding case. Judge Hand's much-discussed decision in James Baird Co. v. Gimbel Bros., [[176]](#footnote-177)185 delivered a year after the publication of the Restatement, was symptomatic of the restrictive view of justifiable reliance engendered by the ALI commentary. [[177]](#footnote-178)186 The 1933 decision involved a general contractor's reliance on a subcontractor's bid when the general contractor submitted his bid on a government construction project. [[178]](#footnote-179)187 Hand depicted promissory estoppel's chief role as the enforcement of a "donative promise," no longer binding by seal, [[179]](#footnote-180)188 and he cited **[\*538]** Holmes' 1903 decision that justifiable reliance cannot bind offers that "propose bargains." [[180]](#footnote-181)189 A New York case decided the same year agreed that promissory estoppel was only for charitable promises. [[181]](#footnote-182)190 In Hand's opinion in James Baird Co., he did not indicate any awareness of earlier decisions, such as Fontaine v. Baxley, which had bound a supplier whose bid was relied upon by a contractor in making his own bids to railway companies. [[182]](#footnote-183)191 Hand seemed to approach the Restatement's promissory estoppel doctrine as if it had wiped the slate clean of prior justifiable reliance decisions in New York, which will be discussed later, that were inconsistent with ALI commentary. [[183]](#footnote-184)192

During the generation following the publication of section 90, academic writers generally shared Hand's understanding that promissory estoppel was unavailable for commercial promises. These restrictive interpretations of section 90 were gleaned both from the impressions given by ALI commentary and from the reality of how narrowly courts applied section 90 during the first couple of decades after 1932. [[184]](#footnote-185)193 Billig acquiesced in Williston's commentary to ALI that promissory estoppel was fundamentally **[\*539]** intended for charitable subscriptions. [[185]](#footnote-186)194 Page, one of the drafters of the Restatement, said in 1947 that gratuitous promises were intended to be the main domain of promissory estoppel. [[186]](#footnote-187)195 Boyer agreed in 1950 that the primary focus of section 90 was gratuitous promises. [[187]](#footnote-188)196 Gilmore remarked in 1974 that, subsequent to the adoption of section 90, there was a judicial and academic "assumption" that promissory estoppel applied mostly, if not entirely, to non-commercial promises. [[188]](#footnote-189)197 Gilmore did not dispute the accuracy of that assumption, and when he commented on the shift to application of section 90 to commercial promises in the late 1950s, he made no claim that this constituted a return to the pre-Restatement judicial application of justifiable reliance. [[189]](#footnote-190)198 When Henderson observed in 1969 that promissory estoppel had expanded from its limited use for gratuitous promises in the 1930s to include commercial promises by the 1950s, he made no suggestion that the justifiable reliance doctrine was finally back to where it stood prior to the 1930s. [[190]](#footnote-191)199

Williston and Corbin began to realize, after an influential judge's decision like in James Baird Co., that they had been too restrained in their description of the scope of promissory liability. Consequently, they tried to modulate the restricted view of promissory estoppel held by Hand and other judges by encouraging a more expansive application. In Williston's second edition of his treatise in 1936, he criticized Hand's limited interpretation of section 90 because an offer proposing a market bargain could be considered a promise under promissory estoppel **[\*540]** as well. [[191]](#footnote-192)200 Williston continued, however, to refrain from elaborating on the legal history that would have evidenced commercial promises being held as binding on account of justifiable reliance prior to the publication of the Restatement. [[192]](#footnote-193)201 Corbin wrote in his treatise in 1950 that the ALI has "constructed a definition" of consideration which is "limited in such a way that the Institute was immediately compelled to construct a number of additional rules," in sections 85 through 94, to deal with justifiable reliance and moral obligation. [[193]](#footnote-194)202 Corbin emphasized that these complementary sections stated "when an informal promise will be enforceable without any consideration." [[194]](#footnote-195)203 Corbin continued, "Courts should not overlook this fact, or fail to examine these additional rules, in quoting or applying the Institute's statement of the consideration doctrine." [[195]](#footnote-196)204 Modern courts had become timid in their application of these complementary bases for promissory liability during the decades after the adoption of the formalist approach of a Restatement championed by the legal elite of the country. [[196]](#footnote-197)205 Corbin tried to remind judges of the flexible application of the doctrines of consideration, justifiable reliance, and moral obligation in the precedents decided during the century prior to 1932.

Early glimmerings of a relaxation of the restrained approach to promissory estoppel appeared in the 1940s. The 1941 decision Robert Gordon, Inc. v. Ingersoll-Rand Co. [[197]](#footnote-198)206 was symptomatic of the halting approach taken by judges in considering a departure from the view that promissory estoppel did not apply to commercial promises. [[198]](#footnote-199)207 The Robert Gordon case contained facts very similar to Hand's James Baird Co. decision eight years **[\*541]** before. [[199]](#footnote-200)208 The plaintiff had relied on the mistaken quote of a manufacturer when the plaintiff prepared his construction bid later submitted to the University of Illinois, and the plaintiff sued the manufacturer after the manufacturer refused to honor his bid. [[200]](#footnote-201)209 The Robert Gordon court noted that courts had not been generous in applying promissory estoppel to commercial promises; [[201]](#footnote-202)210 nevertheless, in dictum, the court stated, "The mere fact that the transaction is commercial in nature should not preclude the use of promissory estoppel." [[202]](#footnote-203)211 Having said that, however, the court denied recovery because the plaintiff failed to meet his burden to prove what the court called "irreparable detriment." [[203]](#footnote-204)212 Such a burden on the plaintiff had not appeared in the case law before 1932 nor has it been seen since the 1950s. [[204]](#footnote-205)213 In any case, the Robert Gordon rationale provided a flawed legal justification for the absence of irreparable harm because the plaintiff suffered a real harm in contrast to the facts of the precedent the court invoked. [[205]](#footnote-206)214 **[\*542]**

Although Justice Traynor's decision in Drennan v. Star Paving Co. [[206]](#footnote-207)215 is generally acknowledged as the turning point in judicial resistance to binding justifiable reliance on commercial promises in the United States, fifteen years earlier in a 1943 South Dakota decision, a subcontractor was bound to his bid on facts on all fours with James Baird Co. [[207]](#footnote-208)216 The South Dakota court expressly disagreed with Hand's position that justifiable reliance could not bind an offer for a bargain because enforcement of a commercial proposal relied upon would not "abolish the requirement of a consideration in contract cases, in any different sense than an ordinary estoppel abolishes some legal requirement in its application." [[208]](#footnote-209)217 Later in the 1958 California decision in Drennan v. Star Paving Co., on facts also similar to those in James Baird, Traynor observed that the subcontractor could foresee that the general contractor would rely on the subcontractor's bid, and therefore the bid could not be revoked after reliance occurred. [[209]](#footnote-210)218

In the context of the contractor's reliance on the sub-contractor's bid, Traynor resurrected the type of resolution effectuated in 1892 in Fontaine v. Baxley. [[210]](#footnote-211)219 More broadly, Traynor provided a signpost for American courts to follow in applying promissory estoppel to commercial promises generally. [[211]](#footnote-212)220 The late 1950s marked a return to the state of the law prior to the publication of the Restatement of the Law of Contracts when commercial promises were held binding on the ground of justifiable reliance with a fair degree of frequency. [[212]](#footnote-213)221 By the late 1960s, a commentator noted that decisional law was beginning to apply promissory estoppel to commercial promises with increasing **[\*543]** regularity, [[213]](#footnote-214)222 and this would be confirmed by the Restatement (Second) a decade later. [[214]](#footnote-215)223

IV. Reliance on Commercial Promises Prior to Section 90

In keeping with the focus of this study, the ensuing discussion exclusively considers case law decided prior to the 1926 dissemination to the profession of the initial draft of what became, in unaltered form, section 90. This case law documents that justifiable reliance had been a judicially recognized ground for enforcement of commercial promises during at least the preceding seventy years, contrary to the claims of the restaters and later legal commentators. Some of these pre-1926 judicial opinions held reliance binding within the confines of the doctrine of consideration, and others articulated justifiable reliance as an independent doctrine. Studies made to-date examining justifiable reliance decisions prior to the first Restatement have analyzed development of the actionability of justifiable reliance from the perspective of the categories of transactions involved, e.g., charitable subscription, familial gift, bailment, agency, etc. [[215]](#footnote-216)224

In contrast, the approach taken in the present study analyzes the evolution of binding justifiable reliance from the perspective of its binding effect on commercial promises in ameliorating the harshness of specific traditional doctrine that denied enforcement of promises drawn to deal with uncertainty. [[216]](#footnote-217)225 Traditional contract rules were developed in the context of a static pre-industrial era to administer one-shot, discrete promissory transactions of short duration. The focus will be on decisions that emphasized the difference justifiable reliance made in overcoming traditional contract law requirements applicable to offer and acceptance and to contract modifications. Doctrinal obstacles under offer and **[\*544]** acceptance involved indefinite offers and the revocability of unilateral and at-will offers, and contract modification problems concerned the bargain demands of the preexisting duty rule.

A. Reliance in Offer and Acceptance

Up to around a decade prior to publication of the first Restatement, plaintiffs experienced difficulties in enforcing offers for commercial contracts which were either unilateral, [[217]](#footnote-218)226 at-will or indefinite because of the appearance in the second quarter of the nineteenth century of the unfortunate requirement known as mutuality. The mutuality notion provided that neither party to a transaction was bound until both parties were bound. Thus an offeror could revoke unilateral, at-will, or indefinite offers even after an offeree was in the process of performance, irrespective of offeree's hardship. Throughout the second half of the nineteenth century, an offeror was generally not bound even once an offeree had partly performed because the offeree was not legally obliged to complete performance. [[218]](#footnote-219)227 The requirement of mutuality had not been a part of contract law prior to the nineteenth century.

Mutuality's success from around the middle of the nineteenth century can probably be attributed to the influence of the arrival of academic treatise writers espousing their predictable generalized theories. [[219]](#footnote-220)228 Before the obstructive mutuality notion was squelched **[\*545]** toward the end of the first quarter of the twentieth century, the doctrine caused significant hardship for contractors who attempted to adapt their business practices to the unpredictability of the modern economy by structuring their transactions in the form of unilateral contracts, at-will relationships, or with sufficient indefiniteness to permit flexible adjustments. [[220]](#footnote-221)229 Mutuality was undoubtedly the single most important doctrinal stimulus to the growth of equitable relief from justifiable reliance hardship during the fifty years following the Civil War.

1. Origins of the Mutuality Doctrine

The 1815 New York decision Tucker v. Woods [[221]](#footnote-222)230 is the earliest known case to use the term mutuality in a way vaguely similar to the way it was used by mid-century. [[222]](#footnote-223)231 An agreement for the sale of land was ruled "a mere proposition" and "without mutuality" when it was discovered that the seller could not give immediate possession to the buyer due to an existing lease with two years to run. [[223]](#footnote-224)232 The court explained that the 1790 English case Cooke v. Oxley [[224]](#footnote-225)233 was on point since "promises must be concurrent and obligatory upon both at the same time." [[225]](#footnote-226)234 In Cooke, the parties agreed early in the day that the buyer had until 4:00 p.m. to decide to buy goods, but when the buyer agreed to buy at 4:00 p.m., the seller refused to sell. [[226]](#footnote-227)235 The court analyzed it as a consideration problem and concluded that no simultaneous exchange occurred at 4:00 p.m., since it was not clear that the seller was still in agreement when the buyer agreed, and so there was no agreement. [[227]](#footnote-228)236 **[\*546]**

Nearly forty years later, this simultaneity element [[228]](#footnote-229)237 was adjusted to accommodate contract formation by business correspondents under the influence of the newly arrived civilian concept of offer and acceptance. The conclusion was reached that, unless contravening evidence was provided, the offeror was making an offer "during every instant of the time" up to the acceptance. [[229]](#footnote-230)238 That solution signaled a doctrinal shift from the unilateral notion of a promise supported by consideration to the bilateral notion of consensus of intention. This shift would bring attention to the anomaly of the modern version of the unilateral contract, and thus began a fitful century-long attempt to rationalize its binding effect. [[230]](#footnote-231)239 Mutuality was a byproduct of the addition of the consensual theory's offer and acceptance on top of consideration as the test for contract formation. [[231]](#footnote-232)240 Although this **[\*547]** line of cases increased the attention given to how there could be compliance with simultaneity, the doctrinal solution to the time lag between offer and acceptance did not bring a wholesale requirement of mutuality into American contract law. The blame for this doctrinally flawed chapter in the history of contract law must be laid at the door of judges who followed Parsons' simultaneous obligation argument included in his contracts treatise published in 1853. [[232]](#footnote-233)241

Parsons admitted that mutuality's mandate that both parties be bound before either could be bound was doubted fourteen years earlier by the English judge Baron Parke. [[233]](#footnote-234)242 In a binding guaranty contract case, Parke had opined, "But a great number of cases are of contracts not binding on both sides at the time when made, and in which the whole duty to be performed rests on one of the contracting parties. A guarantee falls under this class." [[234]](#footnote-235)243 Parke's prominence as a conservative common law thinker notwithstanding, Parsons proclaimed that Parke's view was a "mistake" because the promisor could revoke until the promisee acted and therefore consideration was lacking. [[235]](#footnote-236)244 Parsons elaborated, "But after an engagement on the part of the promisee which is sufficient to bind him, then the promisor is bound also, because there is now a promise for a promise, with entire mutuality of obligation." [[236]](#footnote-237)245 Parsons' language can be found in innumerable judicial opinions during approximately the next seventy-five years. In time, courts would enunciate his verbiage, often without any attribution to him, as if it were a centuries old common law **[\*548]** mandate. [[237]](#footnote-238)246 Parson's paradigm required a mutual exchange of promises in all binding contracts, a model that was impossible for a unilateral contract to fulfill.

Parsons cited an 1839 English criminal law decision as authority for his proposition that a unilateral contract lacked mutuality and thus was invalid. [[238]](#footnote-239)247 The decision involved a criminal prosecution of a defendant for "harbouring" the plaintiff's servant. [[239]](#footnote-240)248 The employee quit the employ of the plaintiff before the end of a long-term contract, but only after the plaintiff resisted the employee's attempt to give a required one year notice to quit. [[240]](#footnote-241)249 An 1824 statute made it a crime for an employee to leave service before the end of the term, but it was only a civil wrong if the employer breached. [[241]](#footnote-242)250 As authority for lack of mutuality, the defendant's lawyer cited an 1831 case decided on the policy ground of unlawful restraint. [[242]](#footnote-243)251 Denman, C.J. did not pursue the policy point in ruling that mutuality was absent, [[243]](#footnote-244)252 but policy appeared to be the subtext of Denman's denial of the validity of the contract. [[244]](#footnote-245)253 **[\*549]**

It was bizarre for Parsons to cite as authority for the requirement of contract mutuality an English decision which used the notion of mutuality as a device to upend a lingering vestige of the guild system's restraint of the free movement of labor. Williston defended Parsons' mutuality proposition and he also supported the doctrine in his 1906 edition of Pollock with the argument that otherwise, an offeror would lose his freedom to structure a contract. [[245]](#footnote-246)254 Nineteenth century contract law insulated entrepreneurs from liability for hardship claims as mutuality became another factor to comply with alongside the parallel requirements of consideration and offer and acceptance. [[246]](#footnote-247)255

2. Revocability of an Offer

Under the mutuality doctrine, an offeror could structure his commercial offer in a unilateral form as a means of retaining maximum maneuverability to decide whether or not to revoke his offer prior to the certitude of an offeree's completed performance. However, due to the hardship of an offeree's justifiable reliance on such revocable offers, some courts began to bar revocation of such promises when necessary to avoid injustice. **[\*550]**

a. Offer for Unilateral Contract

Langdell and Williston strictly applied Parsons' mutuality notion to the issue of revocability of a unilateral contract offer. All three were contract law professors at Harvard over the century from the onset of classical contract rules in the mid-nineteenth century until well into the modern period. Langdell had been a research assistant on Parsons' first edition of his treatise, and Williston edited a later edition of Parsons. [[247]](#footnote-248)256 In 1880, Langdell noted that some courts would avert injustice by holding offers for unilateral contracts irrevocable once the offeree had commenced performance, but he commented that the position had "no principle to rest upon." [[248]](#footnote-249)257 He suggested that the only true protection for an offeree was through formation of a bilateral contract "by means of mutual promises; and if they neglect this precaution, any hardship that they may suffer ought to be laid at their doors." [[249]](#footnote-250)258

This dogmatic refusal to make provisions for reliance hardship was present in an 1890 formalist Minnesota judicial opinion that offered as solutions to the mutuality problem either completion of performance before revocation or re-negotiation as a bilateral contract. [[250]](#footnote-251)259 These suggestions were disingenuous since it would be too late to complete performance once revocation occurred, and an offeror with market power might refuse to agree to a loss of **[\*551]** maneuverability. In the face of the growing case law which nevertheless provided reliance relief, Williston admitted that the issue was "troublesome," but he said it was hard to see why revocation was not permitted "on principle." [[251]](#footnote-252)260 He looked at the other side of the coin and objected that it would be unfair to bind an offeror upon part performance since an offeree would not be bound to complete performance. In 1906, Williston hedged slightly when he acknowledged that, "the practical hardship of allowing revocation under such circumstances is all that can make the decision of the question doubtful." [[252]](#footnote-253)261

Despite the attempts of formalist treatise writers to stamp out reliance relief for unilateral contract offerees, American case law rulings of the late nineteenth and early twentieth centuries continued to be mixed, as some supported Parsons' position while others redressed justifiable reliance. The decisions that provided relief circumvented the mutuality requirement either by making an equitable exception for reliance hardship or by rationalizing that part performance cured the lack of mutuality or acted as an acceptance. Judicial opinions at the turn of the twentieth century in California and Kentucky exemplified this trend.

In Los Angeles Traction Co. v. Wilshire, [[253]](#footnote-254)262 a California court ruled that, after a contractor had expended funds and started construction, "it would be manifestly unjust thereafter to permit the offer that had been made to be withdrawn." [[254]](#footnote-255)263 A Kentucky **[\*552]** court in Louisville & Nashville Railroad Co. v. Coyle [[255]](#footnote-256)264 observed that despite the lack of mutuality when a railroad company offered to buy the railroad ties the plaintiff could produce in one year, that by plaintiff electing to perform, "the want of mutuality is thereby eliminated." [[256]](#footnote-257)265 Further, if a court found, on the facts in evidence, that the offeror had committed a wrong by revocation after offeree's part performance, a court's doctrinal justification for binding the offeror could be bolstered. Some courts held that an offeror, who hindered an offeree's ability to complete performance, was barred from revoking the offer [[257]](#footnote-258)266 or that the hindrance was the equivalent of completion of performance. [[258]](#footnote-259)267

When the facts were egregious enough, some courts concluded that conduct akin to fraud occurred when an offeror revoked after inducing part performance. A Wisconsin court reasoned in Zwolanek v. Baker Manufacturing Co. [[259]](#footnote-260)268 that when a company induced workers to hire on and stay in service with assurances of participation in the company's profit sharing plan, the company essentially committed fraud to fire plaintiff just **[\*553]** before the eligibility period was reached. [[260]](#footnote-261)269 The employer further compromised its position by claiming that the benefits were intended only for officers and shareholders of the company. [[261]](#footnote-262)270 Other types of wrongs found relevant included offeror's negligence and violation of requirements set by the offeror himself. [[262]](#footnote-263)271

As a growing number of jurisdictions gave relief for offerees' part performance of unilateral contracts, a couple of provisos were established regarding the rights of the respective parties. First, an offeror might not prevail if the offeror failed to effectively revoke, even in a jurisdiction that did not treat a relying offeree liberally. [[263]](#footnote-264)272 And second, an offeree might not qualify for relief if the offeree's reliance did not involve the intended contractual performance. [[264]](#footnote-265)273 As to the need for an offeror to unequivocally revoke, an offeror had to clearly manifest intent to revoke or a court would be inclined to protect substantial reliance. The offeror in Quick v. Wheeler [[265]](#footnote-266)274 indicated he did not want offeree to continue delivery of lumber under their output agreement but then was silent when offeree objected that offeror had encouraged him to accumulate more timber on his premises because offeror could not store it. [[266]](#footnote-267)275 **[\*554]** The offeree continued to deliver lumber without further objection from offeror, and the court held offeror was bound because of a failure to make an "unequivocal" revocation. [[267]](#footnote-268)276 Courts would also treat attempted revocations as inadequate if revocation came too late to cut off significant commencement of part performance. [[268]](#footnote-269)277 If the relationship envisioned involved a series of unilateral contracts, revocation was not permitted for those in the series partly performed, but the anticipated ongoing relationship could be terminated. [[269]](#footnote-270)278

On the question of whether an offeree's reliance fell sufficiently within the intended contract performance, a grant of the right to mine coal for fifty years fell afoul of the need to show a part of the intended performance. [[270]](#footnote-271)279 No coal was ever mined, but the would-be miner had paid $ 100 to bind the contract, though the agreement did not require such a payment. [[271]](#footnote-272)280 An Illinois court ruled that mutuality was absent because the part performance exception required a "beginning to perform" pursuant to the "material purpose and object of the agreement," which was to mine and pay attendant royalties. [[272]](#footnote-273)281 Preparatory reliance coupled with only a modicum of the intended contract performance could, however, be sufficient to overcome the mutuality mandate when the reliance was extensive and foreseeable.

In Edwards v. Roberts, [[273]](#footnote-274)282 a landowner agreed to allow a gravel company to mine his property, and mutuality was fulfilled when **[\*555]** the gravel company incurred considerable expenses to run tests and build a railroad spur, though little gravel was excavated. [[274]](#footnote-275)283 Despite the modest amount of actual gravel extracted, the Texas decision stated that "part performance," along with "considerable expenses looking to" contract performance done before any attempted revocation, made the agreement binding. [[275]](#footnote-276)284 Likewise mutuality and consideration were satisfied for an Oklahoma court in the case of an exclusive agent who went to substantial expense to open and staff an office for several months in order to sell lots in the defendant's subdivision, despite the fact little business was generated. [[276]](#footnote-277)285

Judicial relief granted to offerees prior to the first Restatement was justified on scattered grounds, some of which were doctrinally indefensible. This muddled state was exacerbated by the absence of doctrinal guidance from leading contracts treatise writers because of their resistance to such relief until the second decade of the twentieth century. Without the lead of influential academic writers, who generated the mutuality mess in the first place, a growing number of court decisions provided equitable relief based on confused terminology and doctrine, and attorneys' arguments in support of offerees' reliance claims were rife with bewildering nomenclature. [[277]](#footnote-278)286 **[\*556]**

Fuzzy judicial thinking included addled analysis and misuse of equitable estoppel, mutuality, unilateral contracts and the statute of frauds part performance exception. The inappropriate use of equitable estoppel to label reliance on a promise for future performance was discussed earlier in this study. [[278]](#footnote-279)287 The troublesome requirement of mutuality in unilateral contracts has already been canvassed as well [[279]](#footnote-280)288 and will be seen again below in the discussion of at-will and indefinite contracts. The application of the misguided mutuality requirement added on top of the doctrine of consideration in unilateral contracts led to unnecessary disorder and unfairness. [[280]](#footnote-281)289

The very term unilateral often became equated with a contract lacking mutuality and would be characterized as therefore unilateral and void. [[281]](#footnote-282)290 Consequently, for some courts, the depiction of a contract as unilateral made such contracts suspect during the second half of the nineteenth century. [[282]](#footnote-283)291 Further, confused thinking **[\*557]** emanated from attempts to remove a contract from the perceived pitfall of the unilateral box by judicial declarations that an offeree's part performance converted a unilateral contract into a bilateral contract. [[283]](#footnote-284)292 As an Illinois court put it in Plumb v. Campbell, part performance transmuted the unilateral contract into Parsons' paradigm for all binding contracts of "a promise for a promise, with entire mutuality of obligation." [[284]](#footnote-285)293 This was an inaccurate transfer of a classification since, unlike bilateral contract, a unilateral offeree was not bound to complete the partial performance commenced. [[285]](#footnote-286)294 Erroneous thinking was present as well in unilateral contracts involving the part performance exception to the statute of frauds because overcoming the statute facilitated an unspoken, backdoor method to assume, without analysis, the existence of both consideration and mutuality. [[286]](#footnote-287)295 **[\*558]**

i. A Doctrinal Solution Suggested by Academicians

During the second decade of the twentieth century, several academics began to write in support of the increasing instances of judicial relief given unilateral offerees on account of reliance hardship. Academic writers, and eventually restaters of the law, set about suggesting cures to the defective doctrine enunciated in the case law as a means to order the law and thereby encourage the fairness obtained in these decisions. As discussed above, judicial opinions prior to the 1920s rationalized relief as an equitable exception to the mutuality requirement or under the rationale that an offeree's part performance answered the demand for mutuality either because it supplied the mutuality or there was now a promise for a promise. [[287]](#footnote-288)296 Earlier, Langdell expressed no sympathy for the equitable concerns, and while Williston was bothered by the unfair results in decisions strictly adhering to the mutuality requirement, he agreed with Langdell that no basis existed in principle for granting relief. [[288]](#footnote-289)297

However, by around 1910, other academics showed an interest in active support for the equitable results achieved in the courts, but the trick was how to convert that equitable impulse into unassailable contract doctrine in order to encourage its healthy growth. [[289]](#footnote-290)298 This new breed of academic did agree, however, with the doctrinal position of Langdell and Williston that it was wrong, on principle, for courts to justify their rulings by the explanations that part performance resulted in a promise for a promise or that part performance effectively constituted acceptance.

In 1910, Ashley observed in cases granting offerees reliance relief the suggestion of "estoppel" at work, [[290]](#footnote-291)299 and he encouraged **[\*559]** the open application of a device like estoppel to bar revocation after offeree's reliance. [[291]](#footnote-292)300 Ashley admitted that the facts of the cases did not strictly fall under equitable estoppel, but he said, "a doctrine somewhat analogous thereto and depending upon the same ideas would seem to be possible, even though there may be some more suitable nomenclature." [[292]](#footnote-293)301 Four years later, McGovney weighed in to advance what would prove to be the most influential suggestion of a sound theoretical approach to avert reliance hardship caused by offeror's revocation. [[293]](#footnote-294)302 McGovney was uneasy about Ashley's estoppel proposal because it involved "stretching the doctrine of estoppel beyond the vaguest meaning in which it is now applied" and which he thought would "scarcely meet with approval." [[294]](#footnote-295)303 He agreed with Ashley that the doctrinal solution resided in barring the offeror from revoking rather than in retaining previous judicial experimentation with converting a unilateral contract into a binding bilateral contract, [[295]](#footnote-296)304 but he saw precursors to accomplish that goal without the need to mangle equitable estoppel.

In order to defeat the barriers presented by the dogma of mutuality and bargain, McGovney reached for inspiration outside the system in a mid-nineteenth century civilian dissent, and, in part, in the ruminations of English treatise writer Pollock. McGovney highlighted an 1852 dissent to a Louisiana case of an offer for a reward, wherein Preston, J. argued that after part performance the plaintiffs "acquired an inchoate right" that barred offeror's revocation. [[296]](#footnote-297)305 Pollock agreed with the equitable outcome **[\*560]** Ashley's proposal would effectuate, as did McGovney, but Pollock characterized the estoppel notion as "legal sophistry." [[297]](#footnote-298)306 Pollock borrowed from French law the idea that an "acceptance is complete" as soon as offeree makes an "unequivocal beginning of the performance requested." [[298]](#footnote-299)307 As an addendum, Pollock said that at part performance, the no longer revocable offer was then "a promise conditional on the work being done within a reasonable time and otherwise competently." [[299]](#footnote-300)308 McGovney apparently discarded Pollock's approach, stating, "On just what theory the beginning of performance is an acceptance is not explained." [[300]](#footnote-301)309

In the same way that previous American decisions had been defective, Pollock's civilian acceptance proposal was likewise defective in saying that a contract was formed at part performance; however, this would prove a valuable notion pursued by the restaters in their qualification that an offeror's obligation was conditional upon completion of offeree's performance. [[301]](#footnote-302)310 The more important notion for McGovney rested on the suggestion in Preston, J.'s dissent that upon part performance, the offer became irrevocable as opposed to there being an acceptance. [[302]](#footnote-303)311

McGovney perceived two offers being made in a unilateral contract offer: one, the principal offer to sell or buy, and, two, a "collateral[] offer to keep the principal offer open for a reasonable time if the offeree begins performance at once[.]" [[303]](#footnote-304)312 McGovney's implied collateral offer was inspired by the nineteenth century consensual theory contribution permitting courts to imply terms in **[\*561]** order to inject fairness into common law contract. Common law courts had been utilizing the fiction of implied consent as a matter of law in order to incorporate uniform equity into contract doctrine for a century prior to McGovney's article. [[304]](#footnote-305)313 McGovney's solution, grounded upon implied consent, was more palatable to the traditional common law mind than Ashley's or Pollock's open reception of equitable and civilian ideas; nevertheless, however one slices it, the equitable bar of estoppel was being wedded to the common law's doctrine of consideration and its adopted civilian doctrine of offer and acceptance. McGovney said that by beginning performance, the offeree had "paid for" keeping the offer open for the contract term for a reasonable time. [[305]](#footnote-306)314 The offer could not be revoked, but, unlike the faulty conclusion that the offeree was also bound at part performance, the offeror "has only given the offeree an option to reject the principal offer or accept it by completing" performance in time. [[306]](#footnote-307)315 Thus, if the offeree did not take up the option by completion of performance, the offeree would not be in breach because only the collateral offer had been accepted. [[307]](#footnote-308)316 The restaters would not adopt the fiction that an option contract was formed at part performance until the Restatement (Second). [[308]](#footnote-309)317

Corbin, in turn, responded to McGovney's submission in 1917. [[309]](#footnote-310)318 He agreed with McGovney that, upon part performance, the underlying contract was not formed but the offer became **[\*562]** irrevocable; therefore the offeree had the elective power to form the principal contract by completing performance. [[310]](#footnote-311)319 But Corbin opposed McGovney's implied collateral offer as a "fiction" not inferable from the actual facts in the cases. [[311]](#footnote-312)320 The fiction was based upon "policy and general advantage," and Corbin thought it ought to be discarded in favor of a straightforward statement that the "offer shall be irrevocable after the offeree has begun the performance of the requested acts." [[312]](#footnote-313)321 Generally, Corbin's sixty years of commentaries on common law contract emphasized empirical reference to judicial disposition of factual case groupings rather than theoretical constructs supported by resort to artificial common law devices. Since Corbin preferred to derive solutions from actual cases, he did note the growing practice in some courts of barring revocation under "the (so-called) estoppel theory of consideration." [[313]](#footnote-314)322

Williston rejected McGovney's proposal in 1921 because of the lack of precedent to support his idea. [[314]](#footnote-315)323 He admitted the probable advantage to business interests of irrevocability but thought "recognized principles of contract" could only be overcome by "invention of new ones," which he was unwilling to propose. [[315]](#footnote-316)324 Williston and Corbin were both opposed to the artificiality of McGovney's implied term solution and that was enough for Williston to resist any deviation from Parsons' and Langdell's established position, notwithstanding the hardship. In contrast, Corbin was disinclined to reject judicial and academic attempts to effectuate a fair result simply because the solutions **[\*563]** contained theoretical shortcomings. As Corbin remarked, with a Holmesian flourish, in his rejection of Langdell's dogmatic denial of the possibility of irrevocable unilateral offers, "the question of their revocability is not to be determined by rules of pure logic or of mathematics, that there is no inevitable necessity or universal law foreclosing discussion." [[316]](#footnote-317)325 Corbin joined Ashley and McGovney in disagreeing with Williston's resistance to binding the offeror, but not the offeree, upon offeree's part performance. For these three writers, the offeror did not suffer unfairness because he was the instigator of a transaction that placed the risk with the offeree. [[317]](#footnote-318)326

Between the publication of Williston's treatise in 1921 and the first Restatement draft in 1925, Williston changed his position regarding irrevocable unilateral offers after he joined forces on the Restatement drafting committee with Yale law professors Corbin and McGovney, [[318]](#footnote-319)327 two of the four drafters active on the project. The result of their collective efforts was a solution that was obviously influenced by McGovney's suggestions in 1914. The solution enunciated in section 45 stated that offeree's part performance held offeror to a binding implied "subsidiary promise" to not revoke for a reasonable time. [[319]](#footnote-320)328 The lamented requirement of mutuality was now proclaimed to be wrong. [[320]](#footnote-321)329 **[\*564]** Although Pollock's notion that part performance acted as an acceptance was rejected, Pollock's influence was apparent in the wording that the offeror's obligation on the principal contract was "conditional" on the offeree's completion of performance. [[321]](#footnote-322)330 Part performance of the actual contract terms was required, and therefore, the reliance of "beginning preparations" was not enough to preclude revocation. [[322]](#footnote-323)331 Nonetheless, substantial reliance "may in some cases" be sufficient. [[323]](#footnote-324)332

However, McGovney's idea that the binding subsidiary promise gave the offeree an option to accept or reject [[324]](#footnote-325)334 For McGovney, the effect of payment for the subsidiary promise, in the form of part performance, was to grant the offeree the option to reject or accept the principal offer by full performance. [[325]](#footnote-326)335 Section 45 had followed McGovney's lead of employing the traditional common law tools to introduce change in the law through implied terms, analogy and **[\*565]** fiction to effectuate the doctrinal reform of unilateral contract rules that Williston had been unwilling to recommend in 1921. The terms unilateral and bilateral were used in the first Restatement, but they would be dropped from the Restatement (Second) [[326]](#footnote-327)336 because of negative connotations held by some during the nineteenth century that a unilateral contract was void and because of confusion over what type of contract to which the label unilateral actually referred. [[327]](#footnote-328)337

ii. Options and Firm Offers

Before leaving this subject altogether, the judicial contributions made to growth in the doctrine of justifiable reliance in three additional categories of unilateral contract offers must be considered. This section calls for a shift in attention to offers for option contracts and to the firm offer, a related category. The section that follows will focus on guaranty contracts. [[328]](#footnote-329)338

Options intended to be irrevocable for a brief period were often labeled "firm" offers. [[329]](#footnote-330)339 When a merchant stated an offer was "firm," the commercial understanding might have been that it was irrevocable, but, even so, the offer was revocable as a matter of **[\*566]** contract law in the absence of consideration. [[330]](#footnote-331)340 Like other types of unilateral contracts, the offeror's right to revoke began to change in cases of reliance by the latter part of the nineteenth century. [[331]](#footnote-332)341 In contrast to unilateral offers generally, the particular reliance on the promise of irrevocability in these instances frequently involved substantial reliance that did not necessarily include part performance of the contractual terms. [[332]](#footnote-333)343 the offeree made extensive examinations of timber property to determine the value of the property offered. [[333]](#footnote-334)345 substantial improvements to leased property were made by lessee in reliance on a promise to extend a lease. [[334]](#footnote-335)346 Each of these 1920 decisions treated the subsequent substantial reliance as the nineteenth century species of consideration reviled by Langdell and Holmes and referred to by Corbin as the "(so-called) estoppel theory of consideration." [[335]](#footnote-336)347 In Spitzli, the court attributed **[\*567]** a good faith burden to the lessor who induced reliance since the lessor knew that the lessee would make improvements in reliance on the option promise. [[336]](#footnote-337)348 The New York court opined that unjust enrichment to the lessor was avoided by enforcing the lessee's option to purchase on account of the justifiable reliance. [[337]](#footnote-338)349

Reliance on commercial options and firm offers was of particular importance in the case law development of justifiable reliance relief involving contractors bidding on contracts. [[338]](#footnote-339)350 Notwithstanding opposition to binding reliance during the second quarter of the twentieth century, legal history shows that, by the late nineteenth century, options in the form of bids were actionable if relied upon. A good example of this protection of the reliance interest was the 1892 Georgia decision Fontaine v. Baxley. [[339]](#footnote-340)351 In that case, a railroad tie manufacturer in Georgia offered to supply ties at a set price for one year if the buyer's bids to sell ties were accepted by New York railway companies. [[340]](#footnote-341)352 Georgia's Chief Justice Bleckley said the tie manufacturer could have repudiated for lack of mutuality "before [the buyer] . . . had incurred trouble and expense in complying with it on his part." [[341]](#footnote-342)353 The buyer had **[\*568]** relied on the manufacturer's offer to sell railway ties by traveling from Georgia to New York, setting up office in New York, submitting bids to New York railway companies based on the manufacturer's set price, landing contracts with two railways and securing assurances that he had submitted the low bids on three upcoming contracts. [[342]](#footnote-343)354 The court concluded that it would be a "fraud" to permit revocation after substantial reliance. [[343]](#footnote-344)355 The court held that the manufacturer's promise to supply the ties needed to fulfill contracts at a stated price was irrevocable once buyer reasonably relied on supplier's promises of quantity and price in making his bids to railway companies, [[344]](#footnote-345)356 at least as to the two contracts actually formed with the railway companies. [[345]](#footnote-346)357

The outcome in Fontaine was the same as that reached by Traynor on parallel facts in Drennan sixty-six years later, but the judicial opinions in each case approached the problem from different perspectives. The rationale in Fontaine v. Baxley reflected the nineteenth century natural law sensibilities of a jurisdiction comfortable with employing an approach from equity to produce a common law solution. The Georgia court averted a fraud, in equity, by barring revocation of a unilateral offer that had induced the reliance of partial acceptance. This answer came from a practice in equity that barred the potential fraud of raising the statute of frauds to defend against an oral promise after it had induced part performance. [[346]](#footnote-347)358 On the other hand, Traynor provided **[\*569]** a rationale in concert with the yen of twentieth century academicians to supply common law doctrinal techniques to justify reforms and obtain fair results. Traynor combined common law bargain with consensual notions by analogizing the subcontractor's bid to a unilateral offer falling under Restatement section 45. Although the subcontractor did not bargain for plaintiff's justifiable reliance on the subcontractor's bid, Traynor said a fictional implied "subsidiary promise" arose to bar revocation after reliance. [[347]](#footnote-348)359 As with unilateral contract offers generally, this left open the question of whether the protected offeree who relied was obliged to accept the subcontractor's bid. [[348]](#footnote-349)360

Fontaine was authority Judge Hand could have used to provide reliance relief in James Baird Co. v. Gimbel Bros. [[349]](#footnote-350)361 in 1933 but for the doctrinal reaction in the Restatement commentary against the perceived loose reliance theories of the pre-Restatement era. [[350]](#footnote-351)362 In order to obtain just results, Traynor reintroduced a reliance theory to bind suppliers to their commercial bids relied upon when general contractors calculated their own bids. [[351]](#footnote-352)363 Hand demanded a bargained-for, or at the least consensual, ground to bar **[\*570]** revocation, and he decried the loss of the consensual solution the seal provided. [[352]](#footnote-353)364 A decade later, Llewellyn crafted a consensual substitute for the sealed bid in the form of a proposed statutory firm offer rule, [[353]](#footnote-354)365 but this was not the first civilian effort to replace the loss of the seal with the signed writing formality of the commercial age. [[354]](#footnote-355)366 Still, the statutory solution would not protect the reliance interest if a bidder refused to extend a firm offer in compliance with statutory formality.

iii. Guaranty Contracts

As noted above, the issue of lack of mutuality in this unilateral contract category was rejected by Judge Parke of England early in the development of the obstructive notion of mutuality. [[355]](#footnote-356)367 Parke observed: "But a great number of the cases are of contracts not binding on both sides at the time when made." [[356]](#footnote-357)368 He continued that in the case of a guaranty contract, "the party indemnified is not bound to" extend credit, but if he does so, then the guaranty becomes binding. [[357]](#footnote-358)369 Parke's comment that an extension of credit in reliance on the guaranty promise was necessary to bind the guarantor was corroborated in the well known 1862 English guaranty decision Offord v. Davies. [[358]](#footnote-359)370 That court said a guaranty promise was "conditioned" and only became "binding if creditor **[\*571]** acts upon it," and until it was "at least in part fulfilled, the guarantors have the power of revoking it." [[359]](#footnote-360)371

Guaranty contracts had been binding at common law for centuries prior to the nineteenth century; due to their unique nature, they were some of the few instances prior to the industrial-age need for transactions to be designed with a suspension of time between the offer and the acceptance. Parsons, and later his disciple Langdell, wrestled with how to find guaranty contracts in conformity with the invented doctrine of mutuality. Parsons declared that once the creditor relied by extending credit, mutuality's magical moment had arrived in the form of a promise for a promise. [[360]](#footnote-361)372 Langdell, on the other hand, did not deny the binding nature of a guaranty contract at common law, but he nevertheless huffed that Offord v. Davies was one of the "ingenious attempts" to avoid a hardship by declaring an offer irrevocable once performance had begun. [[361]](#footnote-362)373 Langdell said, "such a view seems to have no principle to rest upon." [[362]](#footnote-363)374

Nineteenth century American judicial opinions that held guaranty promises binding after reliance tended to invoke equitable estoppel more than other unilateral contract categories like options and firm offers. Estoppel was perhaps perceived to be a useful device due to the peculiarity of the reliance resounding to the benefit of a third party rather than the promisor. The claimed applicability of equitable estoppel to a guaranty was often erroneous, however, since there was, in essence, injurious reliance on a promise for future action. [[363]](#footnote-364)376 the guarantor induced a creditor to relinquish his lien on his debtor's machinery, so that the guarantor could buy the machinery, in exchange for defendant's guaranty of a new note signed by debtor. [[364]](#footnote-365)377 The court claimed that equitable estoppel **[\*572]** applied, [[365]](#footnote-366)378 but where was the misrepresentation of fact? The creditor had relied on the guarantor's promise to answer for any default by the debtor on the note in the future, and a reporter's note to the opinion inferred as much. [[366]](#footnote-367)379 Rice provided early support for the innovation by American courts of law and equity that injurious reliance qualified as consideration. [[367]](#footnote-368)380 The case reporter saw the shift and questioned whether it was necessary to invent some new definition of consideration. [[368]](#footnote-369)381 Doctrinal concerns notwithstanding, the injection of the reliance impulse in equitable estoppel into the doctrine of consideration was in full swing.

One other important question concerned reliance on the common commercial practice of giving a guaranty promise to cover a series of future credit extensions, as in a letter of credit or an open line of credit. Did the reliance of the first credit extension in the series bind the guarantor to the whole series? In Offord v. Davies, [[369]](#footnote-370)382 the defendant guaranteed that a draper would honor bills of exchange issued by the plaintiff for the next twelve months. [[370]](#footnote-371)383 One credit extension had been honored by the draper before the guarantor revoked midway in the year. [[371]](#footnote-372)384 The guarantor defended on the ground that he had revoked before any further reliance on his guaranty promise. [[372]](#footnote-373)385 The court adopted the measured resolution **[\*573]** that if a part of an extension was made before revocation, then the defendant would be bound for the whole of that extension in the series, but a revocation would be effective as to all remaining potential extensions in the series for which no reliance had yet occurred. [[373]](#footnote-374)386

A question was subsequently raised about the necessity of the offeree giving notice of his or her reliance. Normally, an extension of credit required notice to bind the guarantor, but in a guaranty of a series of potential extensions, the question was asked whether a guaranty could be structured so that notice was not required of extensions after the first one. In Lascelles v. Clark, [[374]](#footnote-375)387 a Massachusetts court concluded the guarantor had to be notified of the first credit extension in order to accept the guaranty, but a guaranty could be crafted so that further notifications of extensions were not required. [[375]](#footnote-376)388 Thus if the guaranty was so drafted, a revocation would be too late as to any later credit actually extended in the series, even though guarantor was not notified of the later extensions. [[376]](#footnote-377)389

b. At-Will Contracts

The last revocability of offer topic in this study runs parallel to the right to revoke unilateral offers in that at-will relations are structured to permit contractors to terminate their relationship at **[\*574]** any time. [[377]](#footnote-378)390 The types of relationships involved, often resembling traditional employment relations, include agency, distributorship, exclusive sales arrangements, franchises, licenses and other related revocable contractual relations. [[378]](#footnote-379)391 The traditional common law presumption that an employment relationship ran year-to-year [[379]](#footnote-380)392 was called into question as relationships in the distributive chain became more complex in an industrial market. Wood's 1877 book on master and servant has been pointed to as a harbinger of this shift. [[380]](#footnote-381)393 Wood declared that, unless an employee could prove to the contrary, the new employment contract paradigm was "at will." [[381]](#footnote-382)394 Modern studies have established that Wood disingenuously cited authority that did not support his audacious claim. [[382]](#footnote-383)395 The proposition proved attractive, however, to an instrumental age keen to facilitate corporate maneuverability to react rapidly to turbulent markets; by the late nineteenth century, the at-will theory had to overtake the field. [[383]](#footnote-384)396 As traditional employment relations were supplanted by more complex alternative arrangements for the distribution of goods and services, the emerging notion of at-will **[\*575]** relations migrated into these modern contractual devices. [[384]](#footnote-385)397 There was a natural doctrinal tendency for courts to expand at-will treatment to modern methods of distribution since agency had always been considered at-will. [[385]](#footnote-386)398 Courts began to reason that, for the purpose of determining revocability, it was immaterial whether agency or distributorship was involved because case law on termination could be applied interchangeably. [[386]](#footnote-387)399

As reliance hardship resulted from at-will treatment of these new methods of marketing, courts softened the impact of the new rule by granting relief for the loss of substantial initial investments necessary to conduct exclusive distribution and franchise agreements. The evolution of this reliance relief began with exclusive sales agreements and licenses, and then, during the first quarter of the twentieth century, theories of recovery evolved to cover more intricate agency and distributorship agreements. The equitable solutions granted in exclusive sales transactions near the turn of the twentieth century were prompted when producers canceled agreements after having induced buyers to accumulate large inventories through promises of exclusive territories. In Saddlery Hardware Co. v. Hillsboro Mills, [[387]](#footnote-388)400 the plaintiff bought **[\*576]** plaid blankets made by the defendant on the understanding that the plaintiff had the exclusive right to sell them in New York City, but the defendant later revoked before the plaintiff could sell the inventory acquired. [[388]](#footnote-389)401 The 1895 New Hampshire decision barred the defendant from selling blankets to anyone else in the city until the plaintiff could sell the blankets purchased in reliance on the promise of an exclusive territory. [[389]](#footnote-390)402

Fifteen years later, a Montana court applied the "rule announced by the New Hampshire court" in Saddlery Hardware Co. to a build-up of inventory under similar circumstances. [[390]](#footnote-391)403 The Montana court said "these parties must have contemplated that the defendant company would give to the plaintiff a reasonable opportunity to dispose of the goods which he had on hand" before defendant revoked. [[391]](#footnote-392)404 This implied consent to a good faith duty not to revoke until plaintiff's induced investment had been recouped would soon be applied by courts and legislatures to distributorship and franchise arrangements, such as those used in contracts between automobile manufacturers and dealers. [[392]](#footnote-393)405

The relief given to buyers in exclusive sales agreements was extended to cover substantial reliance harm suffered by automobile dealers as a consequence of the wheeling and dealing of automobile manufacturers during the rapid growth in the industry in the first quarter of the twentieth century. In a 1912 action brought against Buick Motor Co., an automobile dealer, operating under a ten day cancellation clause, was terminated and refused **[\*577]** delivery of automobiles to fill the three purchase orders the plaintiff had made the effort to obtain. [[393]](#footnote-394)406 The Georgia court ruled that revocation was barred because of the plaintiff's part performance of a unilateral contract, [[394]](#footnote-395)407 but the relationship could also have been characterized as an at-will relationship that could not be terminated once the plaintiff had incurred reliance cost and labor. Automobile manufacturers' abuse of their market power became so egregious that in Erskine v. Chevrolet Motors Co., [[395]](#footnote-396)408 a North Carolina court launched into a diatribe against automobile manufacturers for their unsavory tactics in luring "victimized" dealers into "relying" on the seeming security of "written contracts," when in fact no protection was afforded by their at-will contracts. [[396]](#footnote-397)409 Shortly after the plaintiff signed a written contract to sell the defendant Chevrolet's cars, the plaintiff became uneasy upon hearing that an acquaintance lost substantial start-up costs when Chevrolet arbitrarily canceled his dealership. [[397]](#footnote-398)410

Since either party could cancel the written contract on five days notice, the plaintiff informed Chevrolet's regional general manager that he would cancel if Chevrolet did not give assurances that the same would not happen to him. [[398]](#footnote-399)411 After the general manager gave oral assurances that the contract plaintiff would not be canceled, the plaintiff incurred large necessary start-up expenses; however, the defendant subsequently canceled anyway. [[399]](#footnote-400)412 The North Carolina court reasoned it "was solely on the faith" of the oral assurances that the "plaintiff expended large sums **[\*578]** of money" and that consideration was present. [[400]](#footnote-401)413 The court reinforced its rationale with the comment that Chevrolet "made promises or representations, upon which the plaintiffs had the right to rely, and they were misled thereby to their prejudice." [[401]](#footnote-402)414 The defendant committed something akin to fraud to induce detrimental reliance while not intending to keep the promise. [[402]](#footnote-403)415 Under prior law, Chevrolet's ambiguous assurances in the modified promise not to unreasonably revoke would still have been considered a mere at-will relationship, [[403]](#footnote-404)416 but once the general manager's assurances induced anticipated substantial expenditures, the relationship shifted to an irrevocable one. Here again is the absorption of equitable estoppel, applicable to past misrepresentation of fact, into the common law test for actionability of a promise of future performance. This finding of reliance on the manufacturer's promise in the form of the distributor's expenditure of necessary start-up costs over and above what was needed in a revocable agency became a key factor in binding principals in future decisions. [[404]](#footnote-405)417 **[\*579]** Arriving at the same conclusion as the above line of case, Pennsylvania followed a unique alternative route to provide relief from the justifiable reliance of at-will sales distributors. The genesis of Pennsylvania's solution was in an 1826 decision on a specific performance action brought on account of reliance on a land license. [[405]](#footnote-406)418 The court in Rerick noted that a license is normally revocable by a landowner, but when the plaintiff was induced to build a commercial mill on the defendant's land, it had "the effect of turning such license into an agreement that will be executed in equity." [[406]](#footnote-407)419 The opinion contained discussion about whether the reliance had converted the license into a permanent easement and therefore required consideration and compliance with the statute of frauds. [[407]](#footnote-408)420 The plaintiff argued the improvement on the land made the case resemble decisions which applied the exception that the part performance of possession and improvements made an oral land contract binding. [[408]](#footnote-409)421 The Pennsylvania court extended the **[\*580]** statute of frauds exception, sub silentio, in its reasoning that the license became an agreement supported by consideration once the licensee "has made improvements or invested capital in consequence of" the defendant's "encouragement to expend money." [[409]](#footnote-410)422

The reliance protection on a revocable land license in Rerick laid the groundwork in Pennsylvania at the turn of the twentieth century for the unusual step taken in Harris v. Brown [[410]](#footnote-411)423 of extending the real property license precedent to a license to use intangible personal property. [[411]](#footnote-412)424 The defendant had purchased the assets of an insolvent firm, and she acquired a license to use the former firm's name from her son, a shareholder of the defunct firm. [[412]](#footnote-413)425 After the defendant had applied her business acumen and efforts for four years to make a success of her new business, her son brought an action to bar her use of the trade name. [[413]](#footnote-414)426 The trial court in Harris applied the general rule that a license to use plaintiff's intangible personal property was revocable, but on appeal the Pennsylvania Supreme Court ruled it "would be inequitable and unjust" to allow revocation of the license after licensee acted upon licensor's consent and generated commercial value in the trade name. [[414]](#footnote-415)427 The court cited Rerick as authority, and in a close paraphrase of that opinion, the court said: "It is undoubtedly true that a mere license without consideration is determinable at the pleasure of the licensor. But that is not the rule **[\*581]** in this state, where the enjoyment of the license must necessarily be and is preceded by the expenditure of money." [[415]](#footnote-416)428

The protection of a licensee's reliance interest in Rerick was advanced by Harris, and that protection was further extended in Pennsylvania to exclusive distributorship relationships in 1925 in Bassick Manufacturing Co. v. Riley. [[416]](#footnote-417)429 The plaintiff argued that the general rule provided for the revocability of both the agency relationship and the attendant license of the plaintiff's trade name, [[417]](#footnote-418)430 but the court retorted that more was involved in the distributorship relationship than a revocable agency and license because the defendant was obliged to incur substantial expenditures to maintain a store, employ agents and build up his business in order to get the distributorship off the ground. [[418]](#footnote-419)431 The court said, "the case comes clearly within the rule laid down by the Supreme Court of Pennsylvania in Harris." [[419]](#footnote-420)432 The distributorship relationship, of course, required more complex initial efforts by the distributor than was the case for the licensee in Harris. The Riley decision also cited Rerick as authority and quoted the paraphrase of the Rerick opinion found in Harris. [[420]](#footnote-421)433 Thus in three cases decided under Pennsylvania law during the span of a century, Pennsylvania courts extended the reliance relief granted in 1826 to bar revocation of a land license to a license of a trade name in 1902 and then on to a sales distributorship in 1925.

In the following year, Reporter Williston's report to the ALI portrayed Riley as an anomalous expansion of precedents that had earlier granted specific performance on land gifts relied upon by possession and improvements. [[421]](#footnote-422)435 though no jurisdiction has evolved along the **[\*582]** same path as Pennsylvania in drawing inspiration for treatment of at-will agreements from land licenses. The route to rationalizing reliance recovery for distributors in other jurisdictions like North Carolina has been more mainstream in remaining within the confines of contract theory at law and in equity. Still, the crux of the reasoning employed to reach the conclusion in the North Carolina decision, Erskine, was parallel to that reached under Pennsylvania law in Riley and Harris. These three courts noted more involvement in the relationships than merely an agency or a license, and so each court refused to permit the manufacturer to revoke the distributorship with impunity because each party anticipated that the distributor's enjoyment of profits would necessarily be preceded by substantial start-up costs and labor. [[422]](#footnote-423)436 Under such circumstances, these courts concluded it would be unjust for producers to induce distributors' foreseeable substantial start-up costs without allowing them a reasonable opportunity to recover their investments.

3. Indefiniteness

Drafters of long-term contracts were reluctant to hem themselves in with the definite language mandated by traditional contract doctrine [[423]](#footnote-424)437 due to the swirl of uncertainties in the burgeoning industrial age. Complications inherent in an interdependent economy precipitated experimentation with flexible, open-ended contract language in the face of doctrinal **[\*583]** demands for certainty and mutuality. [[424]](#footnote-425)438 The doctrine of mutuality, with its origins in offer and acceptance, presented a hurdle for offers flexibly crafted to accommodate an uncertain future. As courts came to realize that indefinite contract language mirrored the unpredictability of a modern economy, courts of law and equity found certainty in a promisee's specific reliance on a promise.

The scope of the offer had to be certain in order to award expectation damages, but this was not vital in awarding reliance damages, which could act as a surrogate to protect the expectation interest. [[425]](#footnote-426)439 In a 1910 opinion, an Arkansas court declared that indefiniteness and lack of mutuality in a promise to pay for the output of goods produced was certain at least to the amount of goods "actually delivered." [[426]](#footnote-427)440 The defect of uncertainty alleged in a 1914 California case resided in the plaintiff's contract obligations of "due diligence" and "best endeavors." [[427]](#footnote-428)441 The court concluded that even if the contract was at first indefinite and lacking in mutuality, the actual efforts of the plaintiff in performing his duties satisfied these demands. [[428]](#footnote-429)442 Actionable justifiable reliance provided a bridge between the time when judicial demands of strict definiteness held sway, regardless of hardship, and the broader modern contextual rule that implied consent to a duty of good faith performance can save some open-ended contract language, even in the absence of reliance. [[429]](#footnote-430)443 **[\*584]**

A trio of decisions from the middle of the country rendered between 1887 and 1904 exemplified the challenges contract drafters faced in contending with the rapidly-changing economy as the modern form of business corporation constructed the infrastructure necessary for industrialization to proceed westward across the continent. [[430]](#footnote-431)444 All three cases concerned landowners' agreements to convey land for industrial projects, two for construction of railway lines and the third for a factory. In each case, the precise metes and bounds of the tract to be conveyed were kept indefinite until the industrial concern knew exactly where the installations were needed at the time of construction. After construction began, the landowners in each case raised the defenses of indefiniteness and lack of mutuality, and all three courts ruled that any indefiniteness or lack of mutuality before performance began was no longer thus impaired after the reliance of commencement of construction performance clarified the precise location intended.

The hurly-burly of the late nineteenth century economy was further reflected in the fact that two of the three cases involved business interests which were moving so quickly that they had not been properly formed as corporations when the agreements were struck. [[431]](#footnote-432)445 In Ottumwa, Cedar Falls & Saint Paul Railway Co. v. McWilliams, [[432]](#footnote-433)446 an Iowa court said uncertainty about metes and bounds of a planned railway right of way was justified because of the unknown contingencies the railway company had to allow for as the line wound its way toward the defendant's land. [[433]](#footnote-434)447 The defective legal description was cured once the railway actually **[\*585]** took possession and laid the tracks. [[434]](#footnote-435)448 The court held: "Contracts are to be construed in the light of the facts surrounding the transaction, and known to the parties." [[435]](#footnote-436)449

In the second case, an Illinois court also took the modern perspective that only "reasonable certainty" was needed and would depend on the subject matter, the contract's purpose and the parties' relations. [[436]](#footnote-437)450 The promise to sell the land for a factory site was no longer revocable for lack of mutuality and certainty once valuable improvements were made in reliance on the landowner's promise. [[437]](#footnote-438)451 Relief was limited, however, to protection of the reliance interest for the amount of land occupied by the actual factory site rather than for the number of acres originally promised. [[438]](#footnote-439)452 In the third case, the method of overcoming the defenses of uncertain subject matter and corporate identity in Curry v. Kentucky Western Railway Co. [[439]](#footnote-440)453 was the use of "estoppel" functioning as promissory estoppel. The Kentucky court held, "The doctrine of estoppel prevents a landowner who has encouraged, actively or passively, the appropriation of his land" from revoking his promise to convey after the now-formed corporation had occupied his land. [[440]](#footnote-441)454

Uncertainties over supply and demand that cropped up before the end of the nineteenth century stimulated parties to design contracts to protect their interests, and these novel formats immediately raised definiteness and mutuality objections. Contractors drew requirement contracts to assure a buyer a supply of materials he might need or require in his business over a given **[\*586]** period, and output contracts were drawn to assure demand for the products the seller could produce. Output arrangements proved attractive to producers who wanted to be sure of a market for goods produced but did not want to be bound to produce a specific amount for fear of the long-standing absolute contract principle. [[441]](#footnote-442)455

In a 1906 Kentucky case, a producer of railway ties offered to sell a railway company "all that I could furnish" for the next year. [[442]](#footnote-443)456 After more than a thousand ties had been furnished and paid for, the railway refused to take more. [[443]](#footnote-444)457 Later when sued, the railway defended on the grounds of lack of both certainty and mutuality, but the court ruled the uncertainty had been cured by part performance of both parties [[444]](#footnote-445)458 and that the plaintiff was eligible for expectation damages for the part the defendant refused. [[445]](#footnote-446)459 However, some jurisdictions were only willing to order reliance damages for such open-ended output provisions.

In El Dorado Ice & Planing Mill Co. v. Kinard, [[446]](#footnote-447)460 the defendant agreed to pay the plaintiff "for any" mill-cut yellow pine he could secure from "any mill" for a stated period. [[447]](#footnote-448)461 The plaintiff secured a mill, made preparations, produced lumber and delivered it to defendant. [[448]](#footnote-449)462 The defendant later refused to go through with the remainder of the deal on the grounds of indefiniteness, [[449]](#footnote-450)463 but the Arkansas court said the indefiniteness issue was resolved to the extent of lumber delivered and accepted and granted reliance relief **[\*587]** accordingly. [[450]](#footnote-451)464 Subsequent to the part performance in El Dorado Ice & Planing Mill Co., the parties modified the terms of their relationship to cover the output the plaintiff could generate from a specific mill which the plaintiff had secured. [[451]](#footnote-452)465 For this portion, the court protected the plaintiff's expectation interest because the "entire output of a mill of a known capacity" was "capable of an approximately accurate estimate." [[452]](#footnote-453)466 Thus the purchaser was only bound to pay for the amount actually delivered under the output terms of lumber from "any mill," but expectation damages could be recovered when the output could be calculated with certainty for a particular mill. Soon a producer in an output agreement was said to have to comply with an implied duty of good faith in production; [[453]](#footnote-454)467 today, recovery is permitted for "such actual output or requirements as may occur in good faith." [[454]](#footnote-455)468

Early requirement contracts cases also limited plaintiffs to reliance damages when contract terms were not tied to the buyer's needs, but courts would award expectation damages when the quantity and quality of a contract's subject matter were tied to the buyer's specific business requirements. When a buyer agreed to buy as much fertilizer as he "may want or desire in his business," a 1914 Maryland court held that the uncertain agreement was binding only to the extent of fertilizer delivered. [[455]](#footnote-456)469 No recovery was permitted for possible future deliveries, however, because the amount the buyer might "want" was not ascertainable. [[456]](#footnote-457)470 The court added in dictum that a seller could recover expectation damages **[\*588]** for a definite amount that could be calculated based on a contract term for goods the buyer "needed" or "required" in his business. [[457]](#footnote-458)471 This approach served as a precursor for the application of an implied good faith duty on a buyer to require an amount consistent with buyer's business needs. [[458]](#footnote-459)472 And a buyer who had relied upon a requirement agreement could recover expectation damages based on the quantity the buyer needed in his business as well. [[459]](#footnote-460)473

During the six decades prior to the first Restatement, three phases can be discerned with respect to judicial treatment of contractors' experimentation with indefinite language in longer-term relations. First, during the quarter century after the Civil War, most courts rejected attempts to employ flexible language to accommodate industrial uncertainties, irrespective of reliance. [[460]](#footnote-461)474 During the second phase, running from around 1890 to World War I, courts somewhat regularly gave relief from reliance hardship suffered as a result of such promises. [[461]](#footnote-462)475 By the third phase, starting near the onset of the Great War, judicial acceptance began to emerge in support of the notion of implied consent to good faith performance of open-ended contract terms, irrespective of **[\*589]** reliance. [[462]](#footnote-463)476 Reliance relief acted as a bridge during the second phase between the traditional doctrinal bar to enforcement of indefinite promises and the modern contextual position that some indefinite commercial promises include a binding implied promise to perform in good faith as the future unfolds. The justifiable reliance theory supplied an ameliorating solution prior to the adoption of the consensual theory-inspired common law fiction of implied consent to good faith contract performance.

B. Reliance on Contract Modifications

For centuries, courts refused to enforce contract modifications to reduce or increase a contract obligation because of the fear of coercion and the absence of fresh consideration to support a modification promise. [[463]](#footnote-464)477 This bargain corollary to the doctrine of consideration, known today as the preexisting duty rule, appeared in the sixteenth century in the wake of the emergence of the consideration test for enforcement of promises that looked to future performance. Erosion of this broad prohibition on contract modifications occurred during the nineteenth century as American courts began to provide relief from hardship caused by promisees' reliance on modification promises. This hardship relief would prove to be a harbinger of modern reforms of the preexisting duty rule grounded upon consent alone. [[464]](#footnote-465)478 **[\*590]**

1. Reduction in Obligations

The Rule in Pinnel's Case, enunciated in 1602, is the precedent traditionally invoked to deny a contract modification to reduce an amount owed. [[465]](#footnote-466)479 In 1884, the House of Lords repulsed a serious challenge to the rule in the influential decision Foakes v. Beer, though Blackburn came close to dissenting since a creditor might find benefit in the bird-in-the-hand of part payment. [[466]](#footnote-467)480 Ironically, the attention given to the challenge mounted in Foakes v. Beer actually contributed increased vigor to the Rule in Pinnel's Case. The decision lent more importance to the Rule by consolidating both decreases and increases in contract obligations under what became known as the preexisting duty rule. [[467]](#footnote-468)481

Notwithstanding the long adherence to the bar on modifications, a sprinkling of mid-nineteenth century American decisions began to bind creditors to reduction promises if the debtor relied on the modification. [[468]](#footnote-469)482 An Illinois court held in 1846 **[\*591]** that a debtor's reliance on a time extension, by not rushing to make the original deadline, was consideration for the extension. [[469]](#footnote-470)483 While the English court in Pinnel's Case did not find it relevant that the debtor had paid the agreed reduced amount, some late nineteenth century American decisions held that once a debtor relied on the modification promise by full payment of the reduced amount, the creditor was barred from recovery of the remainder of the original obligation. [[470]](#footnote-471)484 In enforcing a reduction of rent owed, a New York court said: "Both parties acted under this arrangement, and it was executed and carried into effect." [[471]](#footnote-472)485 Another New York court **[\*592]** concluded that Pinnel's Case did not apply to a modification agreement "fully executed," [[472]](#footnote-473)486 despite the fact the agreed part payment had also been made in Pinnel's Case. Some nineteenth century courts of law and equity rejected Pinnel's preservation of the bargain principle when reliance facts indicated that near tortious harm had been induced.

The need for a reduction in the amount due under the contract was occasionally triggered by losses generated by an unanticipated change in circumstances in the new industrial economy. While unanticipated circumstances alone were insufficient to justify enforcement of a modification during the last quarter of the nineteenth century, [[473]](#footnote-474)487 a debtor's reliance on the modification by continuation of what was otherwise a financially untenable project sometimes made the difference. In Ten Eyck v. Sleeper, [[474]](#footnote-475)488 a lessee under a long-term lease of a hotel building became unable to pay the rent due to a general depression in the economy in 1893, and so the lessee informed the lessor he would have to vacate. [[475]](#footnote-476)489 In order to induce the lessee to continue occupancy, the lessor offered him a rent reduction, which the lessee accepted and paid for the next sixteen months. [[476]](#footnote-477)490 **[\*593]**

The Minnesota court asked whether there was sufficient consideration to bind the lessor to the reduction agreement "after it had been acted upon." [[477]](#footnote-478)491 The court noted that mere inability to pay rent would not be a reason to find consideration but that it was a different matter when an unforeseen depression precipitated a reduction agreement that was subsequently performed. [[478]](#footnote-479)492 The unforeseen circumstances and the subsequent reliance assuaged any concern over coerced modifications, and they also established consideration. [[479]](#footnote-480)493 Other jurisdictions would sometimes simply find consideration for a reduction agreement on facts of changed circumstances and a subsequent reliance without development of how this combination of facts supplied a good reason for enforcement. [[480]](#footnote-481)494

2. Increase in Obligations

A modification to increase the contract compensation owed fell under the Stilk v. Myrick [[481]](#footnote-482)495 strain of the preexisting duty rule. This 1809 English decision ruled unenforceable a sea captain's promise to increase the wages of seamen who agreed to work short-handed after other seamen deserted in a foreign port. [[482]](#footnote-483)496 The English court concluded that consideration was lacking, but concern about coercion seemed to be a subtext. [[483]](#footnote-484)497 The leading **[\*594]** nineteenth century American precedent to depart from Stilk v. Myrick was the 1830 decision Munroe v. Perkins. [[484]](#footnote-485)498 The plaintiff in Munroe expressed concern to the defendant about the plaintiff's ability to continue with construction of a hotel for the defendant because of losses, and the defendant assured him he would not lose on the deal if he completed the project. [[485]](#footnote-486)499 In the end, the Massachusetts court employed logic from New York and Pennsylvania decisions, rendered in 1817 and 1818 respectively, to support recovery for completion of the hotel at a higher modified price.

In the 1817 New York decision, Lattimore v. Harsen, [[486]](#footnote-487)501 a contractor indicated that he would have to abandon his contract to open a cart way for the City of New York; subsequently, the contractor completed the work after the defendant agreed to pay more if he would complete construction. [[487]](#footnote-488)502 The New York court declared the plaintiff had the right to elect to breach the contract and incur damages, but the modification became binding when the defendant released the plaintiff from the first contract on the condition that the modified arrangement was performed. [[488]](#footnote-489)503 In the **[\*595]** 1818 Pennsylvania decision, Le Fevre v. Le Fevre, [[489]](#footnote-490)504 the location of an easement, granted by deed, to run a water pipe across the defendant's land was altered at the defendant's oral request, but later the defendant cut the pipe and raised a statute of frauds defense against enforcement of the modified oral license. [[490]](#footnote-491)505 The court held the modified agreement binding because it would be a "fraud" for the defendant to revoke the license after the defendant induced the plaintiff to rely by expenditures and effort to move the water line. [[491]](#footnote-492)506 The court drew on a strain of land cases in which equity barred a statute of frauds defense and granted specific performance on account of justifiable reliance without any reference to the doctrine of consideration. [[492]](#footnote-493)507 If the reliance element was emphasized solely to prevent the fraud of raising a statute of frauds defense, equitable estoppel would have been at play, but since the reliance also effectively supplanted the need to show consideration to support the modification promise, promissory estoppel was present as well. [[493]](#footnote-494)508

The formula Munroe derived from these two precedents was that a contract modification became binding if a party elected to **[\*596]** breach a losing contract and thereafter the victim agreed to waive the breach and pay more compensation in order to induce completion of performance. [[494]](#footnote-495)509 From Lattimore came the notions of right-to-breach and waiver, without emphasis on the subsequent reliance present in its facts, [[495]](#footnote-496)510 and from Le Fevre came the emphasis on induced justifiable reliance. [[496]](#footnote-497)511 Thereafter American courts cited Munroe and occasionally Lattimore, both contracts cases, but courts rarely cited the reliance-based statute of frauds license decision Le Fevre, with the unfortunate increased risk of coercion when the reliance factor was not required in some later cases. [[497]](#footnote-498)512

Through the middle of the nineteenth century, citations to Munroe and Lattimore emphasized reliance on the substituted modification agreement. [[498]](#footnote-499)513 Some jurisdictions emphasized the reliance element when they cited Munroe and Lattimore through the rest of the century. [[499]](#footnote-500)514 However, other decisions emphasized the **[\*597]** Lattimore prong of the Munroe rationale as a means to assert that a modification could be supported by consideration, in the absence of reliance, if there was a rescission of the original contract and a substitution of a new contract. [[500]](#footnote-501)515 And when such cases happened to include reliance facts, they were treated as superfluous. [[501]](#footnote-502)516 This latter strain of decisions lost sight of the fact that the presence of reliance diminished concern over possibile coercion since the promisor induced the reliance.

It is perhaps understandable that the reliance-based decision Le Fevre was not cited as authority in later cases since it had not addressed the issue of consideration; nevertheless, Le Fevre's contribution of the reliance notion was an essential ingredient of the rationale in Munroe. The rescission and substitution fiction supplied a device for enforcement of consensual modifications, but this perversion of Munroe, by undermining the importance of the reliance element, raised the spectre of potential coercion. Concern over potential coercion was particularly acute in the nineteenth century prior to the complete maturity of the then nascent policing mechanisms of good faith, economic duress and unconscionability. In the twentieth century, these modern policing mechanisms would mature and then furnish protection against overreaching in cases where reliance was not at issue. [[502]](#footnote-503)517 **[\*598]**

The influential 1895 Minnesota decision King v. Duluth, M. & N. Railway Co. [[503]](#footnote-504)518 raised concerns about the potential for coercion in case law applications of Munroe which enforced modifications solely because of rescission and substitution, irrespective of reliance. [[504]](#footnote-505)519 The cases criticized were decisions which, like Lattimore earlier, did not articulate the need for reliance in their rationales even when reliance was present in the facts. [[505]](#footnote-506)520 These criticisms were reinforced by doctrinal objections leveled against the right-to-breach theory enunciated in Lattimore and Munroe and supported by Holmes. [[506]](#footnote-507)521 The court in King concluded that an unanticipated change in circumstances assuaged concern over coercion and permitted enforcement of a modification under that exception to the preexisting duty rule. [[507]](#footnote-508)522

Early cases of contract modifications made because of unanticipated changes in circumstances cited the landmark modification precedent Munroe as well, although no changed circumstances were actually present in Munroe. [[508]](#footnote-509)523 One of the **[\*599]** earliest changed circumstances cases appeared in the 1864 New York decision Meech v. City of Buffalo, [[509]](#footnote-510)524 where a contractor unexpectedly hit quicksand while constructing a sewer for the city, and the city agreed to pay more for completion of the work. [[510]](#footnote-511)525 Counsel for the contractor argued that when a contract became a losing proposition due to an unforeseen obstacle, the defendant could waive the breach action and agree to a fair adjustment, citing both Munroe and Lattimore. [[511]](#footnote-512)526 The New York court cited no precedent but obviously drew from Munroe and Lattimore in referring to the contractor's election to breach and the city's subsequent promise of increased compensation, which thereby induced completion of the sewer. [[512]](#footnote-513)527 The court concluded that coercion was unlikely since the contractor was performing in "good faith" when he unexpectedly encountered quicksand. [[513]](#footnote-514)528

A Minnesota court made a similar point in Michaud v. McGregor, [[514]](#footnote-515)529 when it noted the criticism of the risk of coercion in the use of the rescission and substitution aspect of Munroe, but said a case was different when higher costs were caused by unexpected circumstances. [[515]](#footnote-516)530 The plaintiff in Michaud could not complete construction of a store building for the defendant without unanticipated losses, after the plaintiff discovered a large obstruction of rocks in the ground. [[516]](#footnote-517)531 The Minnesota court enforced the modification by applying the original Munroe three-step formula of a waiver of the breach, an agreed increase in **[\*600]** compensation, and subsequent reliance by completion of construction. [[517]](#footnote-518)532

While Meech and Michaud included the dual grounds of reliance and unanticipated circumstances, [[518]](#footnote-519)533 the King decision justified enforcement of the modification to increase compensation solely upon unanticipated circumstances. [[519]](#footnote-520)534 The opinion in King cited both Meech and Michaud with approval since these cases included the types of unforeseen difficulties that qualified for an exception to the general rule. [[520]](#footnote-521)535 Yet, the King court swam against mainstream legal development in opposing enforcement of a contract modification relied upon, when no new burden was thrust upon the relying party. [[521]](#footnote-522)536 Under this approach, a loss on a contract was a risk to be borne unless a substantial change in circumstances placed an additional burden on a party not contemplated by the parties when the contract was made. The consensual theory supplied the basis for enforcement of a modification made due to a **[\*601]** change not contemplated, and the unforeseen circumstances rebutted any inference of coercion. [[522]](#footnote-523)537

Perhaps the King court's resistance to reliance relief, in the absence of changed circumstances, can be attributed to the fact that the reliance element was not always clearly separated from the faulty rescission and substitution theory in cases that focused on the Lattimore aspect of the rationale in Munroe. [[523]](#footnote-524)538 The viewpoint expressed in King did not end the availability of the pure reliance exception, but it did contribute to the decline in the fictional rescission and substitution exception to the preexisting duty rule. [[524]](#footnote-525)539 The reliance prong of the opinion in Munroe and the unanticipated circumstances ground in King comprise the primary justifications at common law for enforcement of modifications of contracts for subject matter other than goods to this day. [[525]](#footnote-526)540

V. Conclusion

Contrary to the position taken in the first Restatement, and also adopted by the legal community during the subsequent generation, the present legal history documents that, since at least the 1860s, promissory relief had been given from reliance hardship suffered as a consequence of the incapacity of common law contract doctrine to accommodate commercial uncertainty. The upsurge in uncertainty during the second half of the nineteenth century prompted commercial parties to try to facilitate ongoing flexible adjustments in their relations through the use of open-ended terms, unilateral contracts, at-will relationships, and a willingness to modify contract terms. However, strict application of contract law requirements -- that commercial agreements operate within the doctrinal confines of reciprocity, mutuality, and **[\*602]** definiteness -- created hardship when promisees relied upon these malleable contracting practices.

Prior to the 1920s, courts were loath to reform formal contract rules as a means of coping with this flux, but due to the increase in reliance hardship claims in the nineteenth century, exceptional relief began to appear for justifiable reliance. At least on this hardship level, courts in the second half of the nineteenth century began the process of adapting contract law to the contextual needs of an uncertain industrial age. These equitable solutions appeared in a myriad of mainstream commercial transactions covered in the present study, comprising, among others, incorporators' liabilities, corporate agreements with landowners, construction contracts, commercial leases, automobile dealerships, sales of goods, patent rights, and agreements with public utilities. Protection of promisees' reliance interests would be a precursor of twentieth century contract law reforms grounded upon consent and good faith and devised to adapt to uncertain commercial conditions.

Nineteenth century judges drew inspiration from notions at law and in equity in developing reliance hardship exceptions to formal doctrine. Analogies were made to equity's protection of a party induced to partly perform an oral land sales contract when the seller raised a statute of frauds defense. Chancellors characterized the raising of the defense as akin to fraud, if not tortious, and would estop the defense and enforce the sale. On the law side, Holt found consideration present to bind a bailee by exhuming the function assumpsit originally performed as a reliance remedy, and Mansfield's court invoked natural law to declare consideration present on reliance facts. Justifications for reliance relief from the asperities of formal doctrine shifted between reasons at law and in equity throughout the nineteenth century.

By at least the 1860s, American courts began to come to the remarkable conclusion that justifiable reliance, though not bargained-for, could constitute sufficient consideration. This was accomplished by courts of law and equity injecting the reliance element found in equitable estoppel and part performance into the consideration test. Justifiable reliance recovery on commercial promises became an important remedial technique for courts by the closing decades of the nineteenth century as concern heightened over reliance hardship suffered on account of the doctrinal refusal to enforce promises drawn to accommodate modern uncertainties. **[\*603]**

Doctrinal impediments were overcome when promisees relied upon new methods of contracting in the form of indefinite language, unilateral contracts, at-will relations and contract modifications. Thus, actual reliance on an indefinite offer was held to supply the certainty demanded by common law contract, and part performance in reliance on an offer for a unilateral contract estopped revocation. Inducement of performance in an at-will relationship meant that the promisee's investment costs were recoverable, if not more. As to contract modification, reliance was said to avert the concern over coercion raised by a modification, and it was deemed akin to fraud to raise the preexisting duty rule in the face of promisor's inducement of continued performance on a losing contract.

As the drafters of the Restatement grappled with the transition seen in the case law, Williston and Corbin disagreed over whether the definition of the doctrine of consideration should encompass the strain of decisions rendered over the previous century in which justifiable reliance qualified as binding consideration. Corbin thought both reliance and bargain should be a part of the definition because so many decisions had held that each ground could constitute sufficient consideration. However, Reporter Williston opted for bargain as the sole ground, as championed earlier by Holmes, and it could not be denied that it was the most common reason found in the case law. Given the nature of a restatement project, Corbin's support for alternative grounds did not perhaps suit the clarity and simplicity sought in a legislative statement like a restatement. Williston could not, however, discard justifiable reliance entirely because of the volume of decisions in legal history that had ruled justifiable reliance actionable. Williston's solution was to disengage justifiable reliance from the consideration test for contract actionability; through this approach, he marginalized justifiable reliance by placing it under the tightly drawn exceptional category he called "promissory estoppel." He circumscribed the reach of the doctrine of consideration to bargains alone, and he asserted that justifiable reliance had been applied almost exclusively to cases of charitable subscriptions and other gratuitous promises. In the process, Williston undermined natural law tendencies in nineteenth century reliance-based decisions and thereby diminished the scope of commercial promisors' liability. **[\*604]**

Williston's contemporaries largely corroborated his implied assertion that justifiable reliance had not been applicable to commercial promises. In fact, as this study shows, case reports during the seven decades prior to publication of section 90 were replete with decisions holding commercial promisors bound on account of justifiable reliance. Actionability in these early cases was rationalized on a variety of bases including justifiable reliance being sufficient consideration and on such equitable grounds as part performance and the inappropriate use of equitable estoppel. Despite Williston's emphasis on the pivotal influence of charitable subscriptions on the emergence of the doctrine of justifiable reliance in the nineteenth century, case reports evidence that commercial reliance decisions were rendered at least as early as the initial charitable subscription decisions. Moreover, the authorities cited in the commercial cases were wholly independent of the charitable subscription decisions. The charitable subscription cases were sui generis, outside the mainstream of promissory transactions, and not the originating source for either justifiable reliance recovery on commercial promises, let alone justifiable reliance relief per se.

Judicial grants of reliance-based promissory relief diminished during the generation subsequent to the 1932 publication of the Restatement due to both the exclusion of justifiable reliance from the consideration construct and the commentary that claimed justifiable reliance had previously been applied almost entirely to gratuitous promises. Recovery by victims who relied upon commercial promises ground to a halt as courts, supportive of the Restatement project, were influenced by the only partially accurate depiction of Williston and his contemporaries. This judicial reticence set the clock back on the availability of justifiable reliance relief to the state of the law nearly a century before. Only in the late 1950s did a reinvention begin of the application of promissory estoppel to commercial promises, albeit without reference to the pre-Restatement precedents.

In closing, conventional wisdom notwithstanding, justifiable reliance relief was conferred to commercial promisees prior to the publication of section 90. A preponderance of these early decisions involved exceptions made to contract doctrine for reliance harm induced by promises designed to flexibly adjust to uncertainties engendered by the burgeoning economy. The denial **[\*605]** by Williston and his contemporaries that justifiable reliance relief was available on commercial promises stymied growth in promissory estoppel for three decades following the publication of section 90. This retardation of justifiable reliance was overcome in time, however, as an equitable conclusion was again reached that commercial promisors must answer for induced injurious reliance. Although suggestions have recently been made that there may be a present day ebbing of justifiable reliance relief, modern courts of law and equity ought not forget that relief for justifiable relief is supported by long-standing authority at common law and in equity. The justifiable reliance doctrine was not a suspect idea created by academics. It is inaccurate to suggest that justifiable reliance is an aberrational upshot; justifiable reliance has been an alternative ground for promissory liability and has co-existed with bargain and moral obligation for the past two centuries. For 150 years it has been a robust American common law solution employed to avert the unfairness of reliance hardship induced in commercial, as well as non-commercial, contexts.

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1. 1 Wilmot, J. would note the presence of these three grounds for promissory liability in 1765. Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039-40 (K.B. 1765). In the early twentieth century, American contracts treatise writers observed that justifiable reliance was an alternative promissory ground to bargain. See WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 124 n.1 (Arthur L. Corbin ed., 3d Am. ed. 1919) [hereinafter CORBIN'S ANSON 1919]; FREDERICK POLLOCK, WALD'S POLLOCK ON CONTRACTS 185, 186 n.d (Samuel Williston ed., 3d ed. 1906) [hereinafter WILLISTON'S WALD'S POLLOCK]. [↑](#footnote-ref-2)
2. 2 See John Style's Case, B.M. MS., Hargrave 388, f. 215b (ca. 1527), reprinted in A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 630 (1975); Doige's Case, Y.B. Trin. 20 Hen. VI, f. 34, pl. 4 (1442), reprinted in C.H.S. FIFOOT, HISTORY AND SOURCES OF THE COMMON LAW: TORT AND CONTRACT 347 (1949); J. H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 384-86 (3d ed. 1990) (commenting that assumpsit as a reliance remedy was "a principle of moral philosophy, closely akin to the modern doctrine of promissory estoppel"); S.F.C. MILSOM, HISTORICAL FOUNDATIONS OF THE COMMON LAW 357 (2d ed. 1981); S. J. STOLJAR, A HISTORY OF CONTRACT AT COMMON LAW 37-38 (1975). [↑](#footnote-ref-3)
3. 3 Fidei laesio was an ecclesiastical action for injury caused by promisor's breach of faith. See R. H. Helmholz, Assumpsit and Fidei Laesio, 91 L.Q. REV. 406, 426-31 (1975) (arguing that common law and chancery each received fidei laesio directly from church courts); MILSOM, supra note 2, at 357; cf. Willard T. Barbour, A History of Contract in Early English Equity, in IV OXFORD STUDIES IN SOCIAL AND LEGAL HISTORY 163-67 (1914) (noting Ecclesiastical chancellor introduced fidei laesio from canon law; if promisee relied, promisor had moral duty to fulfill promise). [↑](#footnote-ref-4)
4. 4 See BAKER, supra note 2, at 387-92. [↑](#footnote-ref-5)
5. 5 See Strangborough v. Warner, 74 Eng. Rep. 686 (K.B. 1589); Sharrington v. Strotton, 75 Eng. Rep. 454, 460 (K.B. 1564-66); see also BAKER, supra note 2, at 388; MILSOM, supra note 2, at 336-37, 343, 357; David Ibbetson, Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count, 41 CAMBRIDGE L.J. 142, 153 (1982) (stating that contractual idea of reciprocity was grafted onto tortious notion of reliance liability for nonfeasance). [↑](#footnote-ref-6)
6. 6 Coggs v. Bernard, 92 Eng. Rep. 107, 113 (K.B. 1703); Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039-40 (K.B. 1765). [↑](#footnote-ref-7)
7. 7 92 Eng. Rep. 107 (K.B. 1703). [↑](#footnote-ref-8)
8. 8 Id. at 113 (stating "that the owner's entrusting him with goods is a sufficient consideration"); accord John Style's Case, B.M. MS., Hargrave 388, f. 215 b (ca. 1527) reprinted in SIMPSON, supra note 2, at 31. Contra OLIVER WENDELL HOLMES, JR., THE COMMON LAW 290-92 (Boston, Little, Brown & Co. 1881) (questioning how reliance could be consideration unless bargained for). Holt also exhumed early assumpsit's distinction between actionable misfeasance and nonfeasance. Coggs, 92 Eng. Rep. at 113; see also Thorne v. Deas, 4 Johns. 84, 96-97, 99 (N.Y. Sup. Ct. 1809). From a tort perspective, the wrong was in the knowing inducement of a change of position to the detriment of the promisee. The need for tortious behavior as early as fifteenth century assumpsit actions was solved in nonfeasance cases when the facts included induced reliance harm. See BAKER, supra note 2, at 386 (commenting that reliance alleged in early nonfeasance cases was "closely akin to the modern doctrine of promissory estoppel"); MILSOM, supra note 2, at 336, 357 ("But consideration itself had its beginning in assumpsit conceived as a reliance remedy."); Kevin M. Teeven, Proving Fifteenth Century Promises, 24 OSGOODE HALL L.J. 121, 135 (1986) (noting a 1424 case of promisee relying to his detriment on promise to repair roof when damages to house resulted from abandonment of project). [↑](#footnote-ref-9)
9. 9 97 Eng. Rep. 1035, 1039-40 (K.B. 1765) (relating that plaintiffs suspended their right to call on their debtor's performance in reliance of defendant financier's assurance that they would honor debtor's draft). Wilmot, J. said, "The suspension of the plaintiffs' right to 'call upon White for compliance with his engagement' is sufficient to support an action." Id. Yates, J. added, "the promise and undertaking of the defendants did occasion a possibility of loss to the plaintiffs." Id. at 1040. Defendants had argued past consideration because plaintiffs took debtor's draft before obtaining defendants' acceptance of draft, but Wilmot saw consideration both in plaintiffs' reliance and in moral obligation, saying the latter was analogous to a father paying for a son's prior cure. Id. at 1039-40. [↑](#footnote-ref-10)
10. 10 Id. at 1040 n.v. [↑](#footnote-ref-11)
11. 12 Rann v. Hughs is reported at 101 Eng. Rep. 1014 n.(a). [↑](#footnote-ref-12)
12. 13 Id. at 1014 n.(a). Rann v. Hughes discredited Mansfield's two propositions that consideration was unnecessary in commercial contracts and that consideration performed an evidentiary role that could therefore be satisfied by a written contract; the Rann decision, however, did not directly reject the reliance notions in Pillans. [↑](#footnote-ref-13)
13. 14 The nineteenth century reaction was not uniform however. See Cook v. Wright, 121 Eng. Rep. 822, 826 (K.B. 1861) (stating that inducement of forbearance furnished consideration); Alliance Bank v. Broom, 62 Eng. Rep. 631, 632 (V.C. 1864) (finding reliance of forbearance relevant). [↑](#footnote-ref-14)
14. 15 See ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 99-105 (1938) (stating that early American courts used natural law to form a system of precedent); GULIAN C. VERPLANCK, AN ESSAY ON THE DOCTRINE OF CONTRACTS 187, 189, 193, 206, 217 (New York, G. & C. Carvill 1826) (urging that law of moral principles ought to apply throughout contract law). [↑](#footnote-ref-15)
15. 16 HOLMES, supra note 8, at 292-94 (criticizing Coggs); CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS § 79 (Boston, Little, Brown & Co. 2d ed. 1880) [hereinafter LANGDELL, SUMMARY] (criticizing Pillans). [↑](#footnote-ref-16)
16. 17 See WILLIAM R. ANSON, PRINCIPLES OF THE LAW OF CONTRACT 129 n.2 (Arthur L. Corbin ed., 4th Am. ed. 1924) [hereinafter CORBIN'S ANSON 1924]; WILLISTON'S WALD'S POLLOCK, supra note 1, at 186-87 n.3. Holmes grudgingly admitted that common law courts were granting relief for reliance hardship suffered subsequent to a promise. See Martin v. Meles, 60 N.E. 397, 398 (Mass. 1901). [↑](#footnote-ref-17)
17. 18 Allegheny College v. Nat'l Chautauqua County Bank of Jamestown, 159 N.E. 173, 177-78 (N.Y. 1927) (Kellogg, J., dissenting); Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039-40 (K.B. 1765) (per Wilmot, J.). [↑](#footnote-ref-18)
18. 19 See AMERICAN LAW INSTITUTE COMMENTARIES ON CONTRACTS, RESTATEMENT NO. 2, 16-20 (1926) [hereinafter ALI COMMENTARIES 1926] (prepared by Reporter Williston). [↑](#footnote-ref-19)
19. 20 See, e.g., Homes v. Dana, 12 Mass. (11 Tyng) 190, 192 (1815); Curry v. Ky. W. Ry., 78 S.W. 435, 436 (Ky. 1904) (holding landowners' promises to induce building of railroad without reference to charitable subscription decisions were binding); Brown v. Marion Commercial Club, 97 N.E. 958, 961 (Ind. Ct. App. 1912) (stating that business subscription was governed by rules for charitable subscriptions). Massachusetts courts led the way in binding charitable subscriptions relied upon. See Trustees of Farmington Academy v. Allen, 14 Mass. (13 Tyng) 172, 176 (1817); Bryant v. Goodnow, 22 Mass (5 Pick.) 228, 229 (1827). [↑](#footnote-ref-20)
20. 21 See Barbour, supra note 3, at 166-67 (commenting that promisor owed a moral duty to relieve reliance hardship in order to realize promisee's reasonable reliance). [↑](#footnote-ref-21)
21. 22 An Act for Prevention of Frauds and Perjuries, 29 Car. II, c. 3, s. 4 (1677); Butcher v. Stapley, 23 Eng. Rep. 524, 525 (Ch. 1685); see also Chicago, B. & Q. R.R. v. Boyd, 7 N.E. 487, 489 (Ill. 1886); Brown v. Hoag, 29 N.W. 135, 137 (Minn. 1886); Barbour, supra note 3, at 166-67. [↑](#footnote-ref-22)
22. 24 See, e.g., El Dorado Ice & Planing Mill Co. v. Kinard, 131 S.W. 460, 462 (Ark. 1910); Buick Motor Co. v. Thompson, 75 S.E. 354, 356 (Ga. 1912); Louisville & Nashville R.R. v. Coyle, 97 S.W. 772, 773 (Ky. 1906); Caddo ***Oil*** & Mining Co. v. Producers ***Oil*** Co., 64 So. 684, 686 (La. 1913); Atl. Pebble Co. v. Lehigh Valley R.R. , 98 A. 410, 412 (N.J. 1916). [↑](#footnote-ref-23)
23. 25 See infra notes 29-45 and accompanying text. [↑](#footnote-ref-24)
24. 26 See Butcher, 23 Eng. Rep. at 525. [↑](#footnote-ref-25)
25. 27 See id. (emphasizing that "possession was delivered according to the agreement"); Chicago, B. & Q. R.R. v. Boyd, 7 N.E. 487, 489 (Ill. 1886); Brown v. Hoag, 29 N.W. 135, 138 (Minn. 1886) (pointing to the fraud of raising statute after reliance of part performance); Edwards v. Old Settlers' Ass'n, 166 S.W. 423, 426 (Tex. Civ. App. 1914) (indicating that possession, payment, and improvements are sufficient "to take a verbal lease out of the statute of frauds"); see 5 JOHN N. POMEROY, A TREATISE ON EQUITY JURISPRUDENCE § 2239 (4th ed. 1918) (characterizing a promisor raising statute of frauds defense after his oral promise induced part performance as a "virtual fraud"). [↑](#footnote-ref-26)
26. 28 See FREDERICK POLLOCK, PRINCIPLES OF CONTRACT WILLISTON'S WALD'S POLLOCK, supra note 1, at 791 ("The plaintiff's right in the first instance rests not on contract but on a principle akin to estoppel."). Equitable estoppel in pais applied to an inducement of reliance by a misrepresentation of fact; this made it a natural device to manipulate and adapt to cases of promises inducing reliance. [↑](#footnote-ref-27)
27. 29 Rerick v. ***Kern***, 14 Serg. & Rawle 267 (Pa. 1826); Le Fevre v. Le Fevre, 4 Serg. & Rawle 241 (Pa. 1818). [↑](#footnote-ref-28)
28. 30 Id. at 244. [↑](#footnote-ref-29)
29. 31 Id. [↑](#footnote-ref-30)
30. 32 Cf. Roscoe Pound, Consideration in Equity, in WIGMORE CELEBRATION LEGAL ESSAYS 435, 452 (Albert Kocourek ed. 1919) [hereinafter Pound, Consideration in Equity]. [↑](#footnote-ref-31)
31. 33 26 Mass. (9 Pick.) 298, 304-05 (1830). [↑](#footnote-ref-32)
32. 34 Id. at 304-05. [↑](#footnote-ref-33)
33. 35 See, e.g., Coyner v. Lynde, 10 Ind. 213, 215 (1858); Sargent v. Robertson, 46 N.E. 925, 926 (Ind. Ct. App. 1897); Michaud v. MacGregor, 63 N.W. 479, 480 (Minn. 1895); Bryant v. Lord, 19 Minn. 342, 347 (1872); McKenzie v. Harrison, 24 N.E. 458, 459 (N.Y. 1890); Evans v. Or. & Wash. R.R., 108 P. 1095, 1096 (Wash. 1910). [↑](#footnote-ref-34)
34. 36 14 Serg. & Rawle 267 (Pa. 1826). The court cited Le Fevre for the proposition that such an oral agreement could be binding. Id. at 270. [↑](#footnote-ref-35)
35. 37 See Bassick Mfg. Co. v. Riley, 9 F.2d 138, 139 (E.D. Pa. 1925); Harris v. Brown, 51 A. 586, 587 (Pa. 1902). [↑](#footnote-ref-36)
36. 39 See, e.g., Wynn v. Garland, 19 Ark. 23, 33-35, 38 (1857) (citing Rerick on similar facts for the point that the "doctrine of part performance" applied to oral land licenses relied upon); cf. 2 HERBERT T. TIFFANY, THE LAW OF REAL PROPERTY § 349 (2d ed. 1920) (noting that decisions like Rerick stated it would be a fraud in equity for a license to be revoked after licensee made improvements "on the faith of the license"). [↑](#footnote-ref-37)
37. 40 3 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 359 n.(c) (Boston, Little, Brown & Co. 7th ed. 1883). [↑](#footnote-ref-38)
38. 41 51 A. 586 (Pa. 1902). [↑](#footnote-ref-39)
39. 42 Id. at 587 (citing Rerick). In Harris, after a license was given to use trade name, the licensee relied by making expenditures and efforts to create a successful business; the court ruled the license thereby became irrevocable. Id. [↑](#footnote-ref-40)
40. 43 Bassick Mfg. Co. v. Riley, 9 F.2d 138, 139 (E.D. Pa. 1925) (ruling that license to trade name and exclusive distributorship could not be revoked since expenditures had necessarily been incurred in reliance on licensor's promises in order to start the business). [↑](#footnote-ref-41)
41. 44 ALI COMMENTARIES 1926, supra note 19, at 15. [↑](#footnote-ref-42)
42. 45 See, e.g., Jack's Cookie Co. v. Brooks, 227 F.2d 935, 938-39 (4th Cir. 1955); Meadows v. Radio Indus., Inc., 222 F.2d 347, 349 (7th Cir. 1955); see also Boulevard Airport, Inc. v. Consol. Voltee Aircraft Corp., 85 F. Supp. 876, 879-80 (E.D. Pa. 1949). [↑](#footnote-ref-43)
43. 46 1 THE AMERICAN LAW INSTITUTE PROCEEDINGS 51 (1923) [hereinafter ALI PROC. 1923]; 2 id. at 24 (stating the goal of devising a restatement "which will be accepted generally as a final authoritative declaration"); cf. GRANT GILMORE, THE DEATH OF CONTRACT 59 (1974) (portraying Restatement project as a reaction of legal establishment to legal realism and the growth in promissory liability). [↑](#footnote-ref-44)
44. 47 1 ALI PROC. 1923, supra note 46, at 56, 62. [↑](#footnote-ref-45)
45. 48 Id. See generally SAMUEL WILLISTON, THE LAW OF CONTRACTS (1921) [hereinafter WILLISTON, 1921 TREATISE]. [↑](#footnote-ref-46)
46. 49 See ALI COMMENTARIES 1926, supra note 19, at 15. In addition to the Reporter and the Special Adviser, the only other active members of the drafting committee were Professors McGovney of Yale and Page of Wisconsin. [↑](#footnote-ref-47)
47. 50 See generally THEOPHILUS PARSONS, THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 1853) [hereinafter PARSONS, 1853 EDITION]. Williston edited the eighth edition of Parsons in 1893. Many other contracts treatises had been published between the first editions of Parsons' and Williston's treatises. E.g., CLARENCE D. ASHLEY, THE LAW OF CONTRACTS (1911); WILLIAM L. CLARK, THE LAW OF CONTRACTS (St. Paul, West 1894); WILLIAM F. ELLIOTT, COMMENTARIES ON THE LAW OF CONTRACTS (1913); J. I. CLARK HARE, THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 1887); CHRISTOPHER C. LANGDELL, A SUMMARY OF THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 2d ed. 1880); WILLIAM H. PAGE, PAGE ON CONTRACTS (1905); 2 THOMAS A. STREET, THE FOUNDATIONS OF LEGAL LIABILITY (1906) (contracts). Corbin would not publish his influential multi-volume treatise until 1950. [↑](#footnote-ref-48)
48. 51 RESTATEMENT OF THE LAW OF CONTRACTS 4 (Tentative Draft No. 1, 1928). [↑](#footnote-ref-49)
49. 52 1 WILLISTON, 1921 TREATISE, supra note 48, § 100. [↑](#footnote-ref-50)
50. 53 Id. [↑](#footnote-ref-51)
51. 54 See Kevin M. Teeven, A History of Legislative Reform of the Common Law of Contract, 26 U. TOL. L. REV. 35, 67-72 (1994). [↑](#footnote-ref-52)
52. 55 Cf. Roscoe Pound, Liberty of Contract, 18 YALE L.J. 454, 464 (1909) (encouraging "sociological movement in jurisprudence" for adjustment of doctrine to human conditions instead of adherence to assumed first principles lacking pragmatic underpinning); Karl N. Llewellyn, Some Realism About Realism -- Responding to Dean Pound, 44 HARV. L. REV. 1222, 1224, 1236-39 (1931) (citing need to group legal situations into narrower categories than in the past to reflect what "people are actually doing"). Protection of reliance incorporates behavioral reality that people will rely on promises which induce justifiable reliance. [↑](#footnote-ref-53)
53. 56 RESTATEMENT OF THE LAW OF CONTRACTS § 75 (1932). [↑](#footnote-ref-54)
54. 57 Id. § 75 cmt. c (1932) (stating that reliance must be bargained for); LANGDELL, SUMMARY, supra note 16, § 79; HOLMES, supra note 8, at 292-94. [↑](#footnote-ref-55)
55. 58 LANGDELL, SUMMARY, supra note 16, § 79 ("The consideration of a promise is the thing given or done by the promisee in exchange for the promise."); HOLMES, supra note 8, at 292-94; see also 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 463 (New York, James Kent 4th ed. 1840); 2 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 354, 357 (Boston, Little, Brown & Co. 2d ed. 1855). Holmes edited the 1873 edition of Kent and wrote a book review of Langdell's 1880 casebook, to which Langdell's Summary was the supplement, and Williston edited the 1893 edition of Parsons. See JAMES KENT, COMMENTARIES ON AMERICAN LAW (O.W. Holmes, Jr. ed., Boston, Little, Brown & Co. 12th ed. 1873); WILLISTON'S WALD'S POLLOCK, supra note 1; Oliver W. Holmes, Jr., Book Notice, 14 AM. L. REV. 233 (1880). See also Edwin W. Patterson, The Restatement of the Law of Contracts, 33 COLUM. L. REV. 397, 416 (1933) (commenting that Langdell established bargain's supremacy in academic circles). [↑](#footnote-ref-56)
56. 59 Williston cited Holmes as an authority for the bargain consideration theory in his 1936 treatise. 1 SAMUEL WILLISTON, THE LAW OF CONTRACTS § 100 (Samuel Williston & George J. Thompson eds., rev. ed. 1936) [hereinafter WILLISTON, 1936 TREATISE]. Perhaps Williston did not invoke Langdell as an authority for bargain consideration because Langdell's scientific formalism was under a withering attack in the 1930s by the ascendant Realists. [↑](#footnote-ref-57)
57. 60 1 WILLISTON, 1921 TREATISE, supra note 48, § 139 at 308-09; see also id. at n.28 (citing Holmes' decision in Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903)). [↑](#footnote-ref-58)
58. 61 HOLMES, supra note 8, at 293-94; cf. LANGDELL, SUMMARY, supra note 16, § 55 (stating that consideration was "commensurate with the obligation which is given in exchange for it"). Reciprocity of bargain and exchange seems to be deeply embedded in mankind's social and economic transactions. See 2 THE REPORTS OF SIR JOHN SPELMAN, 94 SELDEN SOCIETY 293-97 (J. H. Baker ed., 1978) (observing that reciprocity was an accepted principle of morality in Western Europe by sixteenth century as doctrine of consideration evolved); Gouldner, The Norm of Reciprocity: A Preliminary Statement, 25 AM. SOC. REV. 161 (1960); see also BRONISLAW MALINOWSKI, CRIME AND CUSTOM IN SAVAGE SOCIETY 22-25 (1926) (observing that an anthropological study of primitive Melanesian Pacific islanders uncovered the centrality of reciprocity to tribal economic and legal order). [↑](#footnote-ref-59)
59. 62 See HOLMES, supra note 8, at 1; Catherine W. Hantzis, Legal Innovation Within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr., 82 NW. U. L. REV. 541, 558-61 (1988) (observing that pragmatists Peirce and Holmes were empiricists who subscribed to notion that learning and norms were grounded in experience); LOUIS MENAND, THE METAPHYSICAL CLUB 65, 341-42 (2001) (noting Holmes' emphasis on experience and environment and his sympathies for capitalists); Kevin M. Teeven, The Advent of Recovery on Market Transactions in the Absence of a Bargain, 39 AM. BUS. L.J. 289, 295-99 (2002); cf. Oliver W. Holmes, Jr., Book Notice, 14 AM. L. REV. 233 (1880) [hereinafter Holmes, Book Notice] (commenting that law finds its philosophy in "the nature of human needs"); Oliver W. Holmes, Jr., The Path of the Law, 10 HARV. L. REV. 457, 474 (1897) [hereinafter Holmes, Path] (asserting that every lawyer ought to understand economics); HOLMES, supra note 8, at 234 (criticizing Langdell for treating contractors' needs and experiences as irrelevant). Holmes diverged from the pluralist philosophy of pragmatist William James in promoting the monist bargain consideration test. See MENAND, supra, at 377-79. [↑](#footnote-ref-60)
60. 63 HOLMES, supra note 8, at 292, 294-96. [↑](#footnote-ref-61)
61. 64 Langdell's 1880 Summary was a supplement to his casebook, which was reviewed by Holmes the same year. CHRISTOPHER C. LANGDELL, A SELECTION OF CASES ON THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 2d ed. 1880); Holmes, Book Notice, supra note 62, at 233; see also LANGDELL, SUMMARY, supra note 16, § 79 (rejecting Pillans as bad law since the case did not conform to the bargain model enunciated in the 1840 English decision Eastwood v. Kenyon). [↑](#footnote-ref-62)
62. 65 Cf. ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 23-26 (1938) (noting shift from natural law emphasis toward codification and organization). [↑](#footnote-ref-63)
63. 66 HOLMES, supra note 8, at 292. Langdell had done the same thing by denying the efficacy of the reliance factor espoused by Justice Wilmot and Yates in Pillans v. Van Mierop. LANGDELL, SUMMARY, supra note 16, § 79; Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039-40 (K.B. 1765). [↑](#footnote-ref-64)
64. 67 Id. at 113. Bailor's reliance of entrustment of his goods to bailee were induced by bailee's promise to carefully transport. Id. Holmes was of course accurate that there was no bargain in Coggs, but then that is the point in justifiable reliance cases: the defendant-bailee did not bargain for the plaintiff's entrustment. See HOLMES, supra note 8, at 292. [↑](#footnote-ref-65)
65. 68 See A. K. KIRALFY, THE ACTION ON THE CASE 154-60 (1951). The distinction in Coggs between carriers and other bailees was an innovation. Id. at 157. Holt said consideration was irrelevant to bailment but thought it prudent to apply consideration to carriers. Id. at 160. But cf. C.H.S. FIFOOT, LORD MANSFIELD 118-20 (1936) (arguing that Holt did not analyze the case as a problem in contract but rather as the sui generis category of bailment). A few decisions continued to employ the tort logic applied prior to Coggs into the early twentieth century, while nevertheless citing Coggs as authority. See, e.g., Carr v. Maine Cent. R.R., 102 A. 532 (N.H. 1917) (noting reliance on negligent railway's promise to apply for rebate of excessive freight charge before Interstate Commerce Commission deadline). [↑](#footnote-ref-66)
66. 69 See MILSOM, supra note 2, at 343, 357. [↑](#footnote-ref-67)
67. 70 See BAKER, supra note 2, at 447. [↑](#footnote-ref-68)
68. 71 HOLMES, supra note 8, at 292, 294-96. Langdell also chose the easy target of Pillans v. Van Mierop, a controversial Mansfield court decision rejected by the House of Lords in the eighteenth century. See Pillans v. Van Mierop, 97 Eng. Rep. 1035, 1039-40 (K.B. 1765); Rann v. Hughes, 2 Eng. Rep. 18 (H.L. 1778); LANGDELL, SUMMARY, supra note 16, § 79. In Pollock's correspondence with Holmes, Pollock criticized Langdell, and obliquely Holmes, for theoretical claims regarding the common law of contract that were out of step with precedent. 1 THE HOLMES-POLLOCK LETTERS 80 (Mark D. Howe ed., 1942) [hereinafter HOLMES-POLLOCK LETTERS] (Pollock wrote Holmes: "But this is surely not now arguable except in the Langdellian ether of a super-terrestrial Common Law where authority does not count at all."). Pollock was frustrated with his contemporaries' logic that denied the essential case law-driven nature of the common law. [↑](#footnote-ref-69)
69. 72 That is not to say, however, that the majority rule in contract was necessarily that justifiable reliance constituted consideration. See 1 WILLISTON, 1921 TREATISE, supra note 48, § 139, at 308 (acknowledging there were "many other decisions which hold that a detriment incurred in reliance on a promise is not valid consideration unless the detriment was requested as consideration"). [↑](#footnote-ref-70)
70. 73 See generally JAMES KENT, COMMENTARIES ON AMERICAN LAW (Oliver W. Holmes, Jr. ed., Boston, Little, Brown & Co. 12th ed. 1873). Holmes' definition of consideration in The Common Law employs verbiage that is similar to Kent's definition. Holmes wrote that consideration was the "reciprocal conventional inducement, each for the other, between consideration and promise," and Kent wrote: "there must be something given in exchange, something that is mutual or something which is the inducement to the contract." HOLMES, supra note 8, at 293-94; 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 463 (New York, James Kent 4th ed. 1840). Coggs was naturally of some import since it was rendered by the great English common law Chief Justice Holt, the most capable chief justice to sit on the bench between the tenures of Hale and Mansfield. [↑](#footnote-ref-71)
71. 74 4 Johns. 84 (N.Y. Sup. Ct. 1809). [↑](#footnote-ref-72)
72. 76 Thorne, 4 Johns. at 99. [↑](#footnote-ref-73)
73. 77 Id. at 96-97. Kent brushed aside the historic view that an action against a bailee or agent was an action on the case in the nature of a tort, whether for nonfeasance or misfeasance, without the requirement of consideration. Id. Holt said in dictum that a gratuitous bailee would not be liable for nonfeasance. Coggs v. Bernard, 72 Eng. Rep. 107, 113 (K.B. 1703). If this action was to be in contract, then there should have been no reason why liability would not exist in agency or bailment since it had been resolved in the sixteenth century that nonfeasance liability was actionable in assumpsit. See Orwell v. Mortoft, Y.B. Mich. 20 Hen. VII, f. 8, pl. 18 (1505), reprinted in J. H. BAKER & S.F.C. MILSOM, SOURCES OF ENGLISH LEGAL HISTORY 408 (1986) [hereinafter BAKER & MILSOM]; Pickering v. Thoroughgood, B.M. MS. Hargrave 388 (1532), reprinted in A.W.B. SIMPSON, A HISTORY OF THE COMMON LAW OF CONTRACT 628 (1975); Lucy v. Walwyn, K.B. 27/1198, m. 183 (1561), reprinted in BAKER & MILSOM, supra, at 485 (ruling consideration present on nonfeasance facts). [↑](#footnote-ref-74)
74. 78 Thorne, 4 Johns. at 97 (characterizing it as unenforceable moral obligation.). See JOHN THEODORE HORTON, JAMES KENT: A STUDY IN CONSERVATISM 153 (1969) (noting instances of Kent deferring to English law despite the fact he was more sympathetic with the fairness of a civil law rule). [↑](#footnote-ref-75)
75. 79 See HOLMES, supra note 8, at 196-97; Thorne, 4 Johns. at 96-99. [↑](#footnote-ref-76)
76. 80 In addition to Holmes' judicial decisions at the turn of the twentieth century, the reciprocity mantra is found throughout his long correspondence with the English contract writer Pollock. See, e.g., 1 HOLMES-POLLOCK LETTERS, supra note 72, at 177. Pollock, in his correspondence and treatise, preferred the standard of realization of parties' reasonable expectations, whether in the form of protecting expectation or reliance interest, over parties' will or bargain, and he was critical of Holmes' theory of elective right to breach and pay damages. See 1 id. at 80; see also FREDERICK POLLOCK, PRINCIPLES OF CONTRACT x-xii (9th ed. 1921). [↑](#footnote-ref-77)
77. 81 HOLMES, supra note 8, at 295. [↑](#footnote-ref-78)
78. 82 Holmes edited an edition of Kent and a review of a Langdell case book, but he did no original contract research himself. See Holmes, Book Notice, supra note 62, at 233; JAMES KENT, COMMENTARIES ON AMERICAN LAW (O. W. Holmes, Jr. ed., Little, Brown & Co. 12th ed. 1873). It is arguable that his bargain approach may have been drawn from what he learned from Kent and Langdell. See 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 463 (New York, James Kent 4th ed. 1840) ("There must be something given in exchange, something that is mutual or something which is the inducement to the contract."); LANGDELL, SUMMARY, supra note 16, at 58 ("The consideration of a promise is the thing given or done by the promisee in exchange for the promise."). [↑](#footnote-ref-79)
79. 83 See G. EDWARD WHITE, THE COMMON LAW IN JUSTICE OLIVER WENDELL HOLMES 172 (1993). [↑](#footnote-ref-80)
80. 84 See Albert V. Dicey, Holmes's Common Law, SPECTATOR 55 (June 3, 1882), reprinted in Saul Touster, Holmes a Hundred Years Ago: The Common Law and Legal Theory, 10 HOFSTRA L. REV. 673, 712, 714 (1982) (observing that Holmes began with his premise and then went about declaring legal history and policy in a manner that subordinated legal history). Dicey characterized Holmes as an "apologist" for his notion that ancient common law was consistent with modern legal common sense. Id. at 714. An anonymous review stated: "the author's method is no longer that of legal the historian, but that of the analytic and philosophical jurist." Book Review, 26 ALBANY L.J. 484, 485 (1882). Holmes had overstated the importance of the influence of debt's reciprocal quid pro quo in his depiction of the origins of consideration, to the exclusion of the equal importance of its origins in assumpsit conceived of as a reliance remedy. See FIFOOT, supra note 2, at 395-97; MILSOM, supra note 2, at 357. [↑](#footnote-ref-81)
81. 85 That is not to say that the restaters might not have grasped onto the bargain test in legislating the meaning of consideration anyway, but it would have been without the backing of this esteemed adherent of the theory. [↑](#footnote-ref-82)
82. 86 60 N.E. 397 (Mass. 1901). [↑](#footnote-ref-83)
83. 87 Id. at 398-99. Holmes was Chief Justice of the Massachusetts Supreme Court during the last two years of his tenure on that court prior to his elevation to the United States Supreme Court. [↑](#footnote-ref-84)
84. 88 Id. at 398. [↑](#footnote-ref-85)
85. 89 Id. [↑](#footnote-ref-86)
86. 90 Id. [↑](#footnote-ref-87)
87. 91 Id. Holmes wrote: "Courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise." Id. [↑](#footnote-ref-88)
88. 92 Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386-87 (1903). [↑](#footnote-ref-89)
89. 93 Id. at 386. The Common Law was not cited. [↑](#footnote-ref-90)
90. 94 HOLMES, supra note 8, at 1 (observing further that the law had a great deal to do with the "felt necessities of the time, the prevalent moral" theories and that the law "cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics"); Holmes, Book Notice, supra note 62, at 234 (criticizing Langdell's "formal" logic that treated contractors' experience and needs as irrelevant). [↑](#footnote-ref-91)
91. 95 See 1 HOLMES-POLLOCK LETTERS, supra note 72, at 80. Pragmatist William James was a pluralist and opposed to formalism. Holmes took from Pragmatist thought an emphasis on what experience he found useful in life, but his monist approach excluded a reliance-based test. See MENAND, supra note 62, at 366-79. [↑](#footnote-ref-92)
92. 96 FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 1 n.1, 145 n.61 (Winfield ed., 13th ed. 1950); Holmes, Path, supra note 62, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it, -- and nothing else."); 1 HOLMES-POLLOCK LETTERS, supra note 72, at 79-80 (responding to Holmes' right to breach theory, Pollock continually rebutted this view over the decades of correspondence. In 1897 he wrote Holmes: "The inventors of assumpsit clearly thought that breach of contract was wrong -- not merely an election to pay damages rather than perform."). Holmes' exclusive bargain theory made it more difficult to bind a promisor. When that theory was coupled with his controversial notion regarding an elective right to breach and pay damages, Holmes exhibited disregard for dashed expectations, whether the harm was to the reliance or expectation interest. [↑](#footnote-ref-93)
93. 97 Pound, Consideration in Equity, supra note 32, at 459. [↑](#footnote-ref-94)
94. 98 WILLISTON'S WALD'S POLLOCK, supra note 1, at 1. [↑](#footnote-ref-95)
95. 99 Id. at 186-87 n.3. [↑](#footnote-ref-96)
96. 100 See 3 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 359 (Boston, Lilttle, Brown & Co. 5th ed. 1866). Parsons cited the land license reliance case Rerick among other cases. Id. at 359 n.(c). (citing Rerick v. ***Kern***, 14 Serg. & Rawle 267, 271 (Pa. 1826)). [↑](#footnote-ref-97)
97. 101 See MELVILLE M. BIGELOW, A TREATISE ON THE LAW OF ESTOPPEL 441 (Boston, Little, Brown & Co. 2d ed. 1876) (observing that representations about the future can "come to a contract, with all the peculiar consequences of contract"). Bigelow cited Faxon v. Faxon. Id. (citing Faxon v. Faxon, 28 Mich. 159, 161 (1873) (applying equitable estoppel to uncle's promise to not foreclose in order to induce nephew to return to work farm and care for orphaned siblings)). [↑](#footnote-ref-98)
98. 103 Id. at 303-04. [↑](#footnote-ref-99)
99. 105 See Lucy v. Walwyn, Gell's Reports, ff. 154v., 158v. (1561), reprinted in BAKER & MILSOM, supra note 78, at 485 (employing trespassory guise in action on the case on reciprocal agreement); MILSOM, supra note 2, at 358-59 (stating the trespassory reliance origins converted into reciprocity as assumpsit became a contract action); John H. Baker, Origins of the "Doctrine" of Consideration, 1535-1585, in ON THE LAWS AND CUSTOMS OF ENGLAND: ESSAYS IN HONOR OF S.E. THORNE 336, 346-50 (Morris Arnold ed., 1981); David Ibbetson, Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count, 41 CAMBRIDGE L.J. 142, 153 (1982). [↑](#footnote-ref-100)
100. 106 Rice, 32 Conn. at 304. [↑](#footnote-ref-101)
101. 107 1 WILLISTON, 1921 TREATISE, supra note 48, § § 100, 139. [↑](#footnote-ref-102)
102. 108 Id. [↑](#footnote-ref-103)
103. 109 Id. § 139. Contemporaneous with Williston's preparation of his treatise, decisions continued to dribble out treating justifiable reliance as a basis for finding consideration. See, e.g., Wilson v. Spry, 223 S.W. 564, 568-69 (Ark. 1920); Spitzli v. Guth, 183 N.Y.S. 743, 747 (N.Y. Special Term 1920). [↑](#footnote-ref-104)
104. 110 CORBIN'S ANSON 1919, supra note 1, at 124 n.1. Williston and Corbin, the two most important American contract writers of the twentieth century, gained experience in contract treatise writing by editing Pollock and Anson, the two most influential English treatise writers of the era; Pollock's first edition appeared in 1876 and Anson's in 1879. [↑](#footnote-ref-105)
105. 111 60 N.E. 397 (Mass. 1901). [↑](#footnote-ref-106)
106. 112 CORBIN'S ANSON 1919, supra note 1, at 124 n.1; Martin, 60 N.E. at 398. [↑](#footnote-ref-107)
107. 113 The precedent Holmes cited in his 1903 decision in support of bargain being the exclusive consideration test was his own Massachusetts opinion from two years before. Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903); Martin, 60 N.E. at 398. [↑](#footnote-ref-108)
108. 114 CORBIN'S ANSON 1919, supra note 1, at 124 n.1. Corbin's 1921 case book included nine justifiable reliance cases in a section under the consideration topic entitled "Reliance on a Promise as Consideration." ARTHUR L. CORBIN, CASES ON THE LAW OF CONTRACTS (1921). Cardozo noted that, although Holmes had "separated the detriment, which is merely the consequence of the promise from the detriment" which is the motive for the promise. Allegheny College v. Nat'l Chautauqua County Bank of Jamestown, 159 N.E. 173, 174-75 (N.Y. 1927) (citing sections 16 and 139 of Williston's 1921 treatise). Contrary to Holmes' monism, Cardozo emphasized that promissory estoppel had emerged as a substitute for consideration in American law. Id. [↑](#footnote-ref-109)
109. 115 Arthur L. Corbin, The Effect of Options on Consideration, 34 YALE L.J. 571, 571 (1925). Corbin's embracive, Whitmanesque view of the doctrine of consideration contained a civilian view of promissory liability not seen since Mansfield. [↑](#footnote-ref-110)
110. 116 RESTATEMENT OF THE LAW OF CONTRACTS § 75 (1932). [↑](#footnote-ref-111)
111. 117 See RESTATEMENT OF THE LAW OF CONTRACTS § 75 cmt. c (1932) ("The fact that the promisee relies on the promise to his injury, or the promisor gains some advantage therefrom, does not establish consideration without the element of bargain or agreed exchange."). [↑](#footnote-ref-112)
112. 118 Moral obligation, the third judicial ground for promissory relief, was also partially covered. Id. § § 85-94. [↑](#footnote-ref-113)
113. 119 ALI COMMENTARIES 1926, supra note 16, § 88. [↑](#footnote-ref-114)
114. 120 See, e.g., 3 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 359 (Boston, Little, Brown & Co. 5th ed. Boston, Little Brown 1866; BIGELOW, supra note 102, at 441; HOLMES, supra note 8, at 292; WILLISTON'S WALD'S POLLOCK, supra note 1, at 186-87 n.3. [↑](#footnote-ref-115)
115. 121 The difficulty with the use of assumpsit to recover for a loss caused by justifiable reliance was that assumpsit had not been an action for harm resulting from misleading conduct since the sixteenth century. Now there would be an attempt to be forthright about what nineteenth century judges had done in smuggling it in through equitable estoppel. Cf. Warren A. Seavey, Reliance upon Gratuitous Promises or Other Conduct, 64 HARV. L. REV. 913, 914, 925-26 (1951). [↑](#footnote-ref-116)
116. 122 Clarence D. Ashley, Offers Calling for a Consideration Other than a Counter Promise, 23 HARV. L. REV. 159, 168 (1910) (acknowledging that "even though there may be some more suitable nomenclature"); see BIGELOW, supra note 102, at 345 ("Estoppel by matter in pais, otherwise denominated estoppel in fact, . . . has reference to a representation express or implied, and precludes a denial of its truth."); cf. White v. Ashton, 51 N.Y. 280, 285 (1873) (explaining succinctly that estoppel in pais applies to misrepresentation of a fact but not to a "promise to do a given thing"). Estoppel is grounded upon the tort notion that the defendant must pay for harm caused by foreseeable reliance; the wrong is inducing the victim's change of position. See Seavey, supra note 121, at 926; see also Warren L. Shattuck, Gratuitous Promises -- A New Writ?, 35 MICH. L. REV. 908, 943-44 (1937) (observing that a promise calculated to induce injurious reliance could be considered a tort if injurious reliance does indeed occur). [↑](#footnote-ref-117)
117. 123 1 WILLISTON, 1921 TREATISE, supra note 48, § § 100, 139. [↑](#footnote-ref-118)
118. 124 See Dudley O. McGovney, Irrevocable Offers, 27 HARV. L. REV. 644, 657 (1914). [↑](#footnote-ref-119)
119. 126 Ashley, supra note 123, at 168; cf. Lon L. Fuller & William R. Perdue, The Reliance Interest in Contract Damages: 2, 46 YALE L.J. 373, 404 (1937) (commenting that distinguishing between a misrepresentation of fact and a promise is often difficult and often not worth worrying about). During the phase when common law courts only occasionally gave promissory relief under estoppel, while resisting the open recognition of justifiable reliance relief on promises for future action, specialized treatises on the subtleties of traditional notions of estoppel proliferated until promissory reliance relief was broadly granted. Thus the topic was meticulously canvassed in the nineteenth century in the United States but now is of little concern; whereas, in England, the vagaries of estoppel continue to be debated as courts restrain the limited version of promissory estoppel permitted. See Crabb v. Arun District Council, Ch. 179, 193 (Eng. 1976) (Scarman, J. commented, "I do not find helpful the distinction between promissory estoppel and proprietary estoppel [found in the textbooks]."). [↑](#footnote-ref-120)
120. 127 RESTATEMENT OF THE LAW OF CONTRACTS xii (1932). [↑](#footnote-ref-121)
121. 128 RESTATEMENT OF THE LAW OF CONTRACTS § 90 (Proposed Final Draft No. 1 (1928)) [hereinafter ALI DRAFT AND COMMENTS 1928]. [↑](#footnote-ref-122)
122. 129 CORBIN'S ANSON 1919, supra note 1, at 124 n.1; CORBIN'S ANSON 1924, supra note 17, at 129 n.2 ("Indeed, there are many cases justifying the statement that consideration may consist of acts in reliance upon a promise even though they were not specified as the agreed equivalent and inducement, provided the promisor ought to have foreseen that such action would take place and the promisee reasonably believes it to be desired." (Corbin's emphasis)); RESTATEMENT OF THE LAW OF 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 enforcement of the promise."). Gilmore argued that his hero Corbin was the force behind the inclusion of section 90 into the 1926 draft, but that goes too far in ignoring Williston's promissory estoppel analysis in his 1921 treatise. GRANT GILMORE, supra note 46, at 63-64; 1 WILLISTON, 1921 TREATISE, supra note 48, § 139. [↑](#footnote-ref-123)
123. 130 ALI COMMENTARIES 1926, supra note 19, at 19-20. [↑](#footnote-ref-124)
124. 131 CORBIN'S ANSON 1919, supra note 1, at 124 n.1; 1 WILLISTON, 1921 TREATISE, supra note 48, § 100 (including justifiable reliance as a consideration ground). [↑](#footnote-ref-125)
125. 132 1 WILLISTON, 1921 TREATISE, supra note 48, § 139 (suggesting promissory estoppel "as a substitute for consideration" at least for gift promises and waivers); RESTATEMENT OF THE LAW OF CONTRACTS § 75 cmt. c (1932) (precluding unbargained-for justifiable reliance from qualifying as bargain consideration). [↑](#footnote-ref-126)
126. 133 E. Allan Farnsworth, Contracts Scholarship in the Age of the Anthology, 85 MICH. L. REV. 1406, 1460 (1987); 1 WILLISTON, 1921 TREATISE, supra note 48, § 139; CORBIN'S ANSON 1919, supra note 1, at 124 n.1. [↑](#footnote-ref-127)
127. 134 1 WILLISTON, 1921 TREATISE, supra note 48, § § 100, 139. [↑](#footnote-ref-128)
128. 135 Id. § 139. In his definition of consideration, Williston suggested that reliance relief might just as appropriately be administered under tort. Id. § 100. [↑](#footnote-ref-129)
129. 136 Id. § 139. [↑](#footnote-ref-130)
130. 137 CORBIN'S ANSON 1919, supra note 1, at 124 n.1. [↑](#footnote-ref-131)
131. 138 See 1 WILLISTON, 1921 TREATISE, supra note 48, § 139. In his 1936 edition, Williston noted section 90's limited nature as stated in "carefully formulated language," and he repeated the latter part of his commentary to the ALI in 1926 that it was not a "sweeping rule" but one with limitations such as definite promise and substantial reliance. 1 WILLISTON, 1936 TREATISE, supra note 59, § 140. [↑](#footnote-ref-132)
132. 139 1 CORBIN, supra note 126, § 193. [↑](#footnote-ref-133)
133. 140 WILLISTON'S WALD'S POLLOCK, supra note 1, at 186-87 n.3 (giving only charitable and business subscriptions as examples of binding justifiable reliance). [↑](#footnote-ref-134)
134. 141 Id. at 186-87 n.3. [↑](#footnote-ref-135)
135. 142 1 WILLISTON, 1921 TREATISE, supra note 48, § 139, at 308. [↑](#footnote-ref-136)
136. 143 ALI COMMENTARIES 1926, supra note 19, at 16 (referring to his 1921 treatise). [↑](#footnote-ref-137)
137. 144 In addition to gift promises, Williston did note other instances of actionable reliance relief outside the commercial mainstream for waivers and land licenses. See 1 WILLISTON, 1921 TREATISE, supra note 48, § 139. [↑](#footnote-ref-138)
138. 145 If Williston's claim had been that charitable subscription cases may have been one of the first categories of cases in which justifiable reliance received open recognition independent of consideration, he might have been on to something. Cf. Benjamin F. Boyer, Promissory Estoppel: Principle From Precedents: I, 50 MICH. L. REV. 639, 652 (1952) [hereinafter Boyer I]. But Williston's claim goes beyond that by not admitting that widespread reliance relief had been granted in the nineteenth century on commercial promises; some of these reliance cases had been rationalized within the confines of consideration and others rested upon independent reliance grounds. This is the subject of section IV hereinafter. [↑](#footnote-ref-139)
139. 146 See, e.g., Brown v. Marion Commercial Club, 97 N.E. 958, 961 (Ind. Ct. App. 1912) (stating that the issue of enforceability of subscription to encourage industries to come to the community was "governed by rules for charitable subscriptions"). [↑](#footnote-ref-140)
140. 147 1 WILLISTON, 1921 TREATISE, supra note 48, § 139. [↑](#footnote-ref-141)
141. 148 Id. at 308. [↑](#footnote-ref-142)
142. 149 Id. at n.25 (commenting that courts allowed juries to find a bargain when it would seem that only induced reliance was present). [↑](#footnote-ref-143)
143. 150 ALI COMMENTARIES 1926, supra note 19, at 15-19. The 1926 commentary was repeated verbatim in the 1928 commentary. See ALI DRAFT AND COMMENTS 1928, supra note 129, at 246-49. [↑](#footnote-ref-144)
144. 151 See Shattuck, supra note 123, at 917-18 (explaining that consideration need never have entered law of bailment and of agency since reliance of entrusting property to bailee or agent had been governed by standard of due care since thirteenth century). Licenses were traditionally revocable and consideration was relevant to the analysis. See Rerick v. ***Kern***, 14 Serg. & Rawle 267, 271 (Pa. 1826) (ruling land license converted to easement due to reliance); Harris v. Brown, 51 A. 586, 587 (Pa. 1902) (concerning intangible personal property). [↑](#footnote-ref-145)
145. 152 1 WILLISTON, 1921 TREATISE, supra note 48, § 139, at 310; cf. FIFOOT, supra note 3, at 414 (stating that an element essential to formation is irrelevant to discharge). [↑](#footnote-ref-146)
146. 153 ALI COMMENTARIES 1926, supra note 19, at 16-17. Four illustrations were provided for section 90 in 1928, and the same in 1932, involving reliance on gratuitous promises not to foreclose, on an annuity to an employee, on a family gift, and on an unenforceable gratuitous option. RESTATEMENT OF THE LAW OF CONTRACTS § 90 illus. 1-4 (1932). [↑](#footnote-ref-147)
147. 155 The seal was abolished in United States during first half of nineteenth century. The loss of the seal undoubtedly had some influence upon judicial grants of hardship relief by the mid-nineteenth century in the gratuitous promise strain of justifiable reliance cases. [↑](#footnote-ref-148)
148. 156 The Uniform Written Obligations Act (1925) tried to set the clock back to when the seal was in regular usage, but it was passed only in Pennsylvania and Utah, and Utah later repealed it. See PA. STAT. ANN. tit. 33, § § 6-8 (1927); UTAH LAWS, c. 62 (1929). [↑](#footnote-ref-149)
149. 157 A feature of Williston's style of treatise writing was to include precedent contrary to his black letter text in his footnotes, often without factual annotations. A completely informed reader of the case law like Williston could do no less; this approach contrasted with occasional writers on contracts, like Holmes and Langdell, who resided in the upper reaches of the theoretical atmosphere, seemingly oblivious to contrary decisional law except when criticizing it. [↑](#footnote-ref-150)
150. 158 See RESTATEMENT OF THE LAW OF CONTRACTS § 90 (1932). [↑](#footnote-ref-151)
151. 159 ALI DRAFT AND COMMENTS 1928, supra note 129, at 245. [↑](#footnote-ref-152)
152. 160 Id. at 20. [↑](#footnote-ref-153)
153. 161 ALI COMMENTARIES 1926, supra note 19, at 20. [↑](#footnote-ref-154)
154. 162 Contra 2 Fuller & Perdue, supra note 127, at 401-04; Shattuck, supra note 123, at 911 (characterizing relief in the form of reliance damages to be akin to a tort remedy); Seavey, supra note 121, at 926 (explaining that estoppel is based on tort doctrine that a defendant must pay for harm caused by reasonable reliance). If a jury is instructed that damages must be in reliance or none at all, a jury might deny recovery if only lesser damages seem just. [↑](#footnote-ref-155)
155. 163 See ROSCOE POUND, THE FORMATIVE ERA OF AMERICAN LAW 99-105 (1938). Mutuality had a similar dampening effect on promissory liability in the nineteenth century as discussed in Part IV.A.1. supra. [↑](#footnote-ref-156)
156. 164 CORBIN'S ANSON 1924, supra note 17, at 129 n.2. [↑](#footnote-ref-157)
157. 165 Id. [↑](#footnote-ref-158)
158. 166 See id. In Corbin's writings subsequent to 1932, perhaps he felt obliged as a member of the Restatement drafting committee to be a team player and not directly subvert Williston's commentary published by the ALI. [↑](#footnote-ref-159)
159. 167 Shattuck, supra note 123, at 913-35 (describing early reliance case facts prior to 1932 in areas of gift promises, waivers, bailment, and agency). [↑](#footnote-ref-160)
160. 169 All lawyers of any significance seemed to support, if not be involved in, the restatement project. The judiciary was led by Chief Justice Hughes of the U.S. Supreme Court, along with Cardozo, Hand, et al. The American Bar Association supported it and was led by Elihu Root. The Association of American Law Schools was an early instigator and was led by Pound, Williston, and other academic luminaries. See 1 ALI PROC. 1923, supra note 46, at 51-60. See also KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 217-23 (1990) (discussing the movement toward codification and restatement from 1875 to 1950). Criticisms of Williston's promissory estoppel ideas were muted in the legal literature during the generation subsequent to 1932 as discussed in Part III.C. supra. [↑](#footnote-ref-161)
161. 170 See GILMORE, supra note 46, at 63-64. Gilmore only gave case examples of reliance relief on gift promises prior to the 1950s. Id. at 66, 130-31 nn.150-52.; cf. Charles L. Knapp, Rescuing Reliance: The Perils of Promissory Estoppel, 49 HASTINGS L.J. 1191, 1196, 1198 (1998) (claiming nineteenth century usage of promissory estoppel was on intra-family promises). [↑](#footnote-ref-162)
162. 171 RESTATEMENT OF THE LAW OF CONTRACTS § 75 cmt. c (1932) ("The fact that the promisee relies on the promise to his injury . . . does not establish consideration without the element of bargain or agreed exchange."). [↑](#footnote-ref-163)
163. 172 64 F.2d 224 (8th Cir. 1933). [↑](#footnote-ref-164)
164. 173 Id. at 233. [↑](#footnote-ref-165)
165. 174 Id. at 232-33 (ruling it uncertain, lacking in mutuality, and terminable at-will). [↑](#footnote-ref-166)
166. 175 James Barclay & Co. v. Bailey, 34 F. Supp. 665, 666 (E.D. Tenn. 1940) (ruling that, despite counterclaimant's good faith, reciprocity and mutuality were lacking). [↑](#footnote-ref-167)
167. 176 Id. [↑](#footnote-ref-168)
168. 177 In Heggen v. Clover Leaf Coal & Mining Co., 253 N.W. 140, 142 (Iowa 1934), the defense raised Stilk v. Myrick to defend against modification. Id. [↑](#footnote-ref-169)
169. 178 122 P.2d 8 (Cal. 1942). [↑](#footnote-ref-170)
170. 179 Id. at 10. Bard v. Kent would be cited to the same effect in 1964. Ferreyra v. E. & J. Gallo Winery, 41 Cal. Rptr. 819, 822-23 (Cal. Ct. App. 1964). The dissenting opinion stated the majority took "too narrow a view of the scope of contract" since the reliance of employee moving from Argentina to California to take a job was the "motivating reason for the contract." Id. at 824. [↑](#footnote-ref-171)
171. 180 Bard, 122 P.2d at 10. Much less evidence of a promise would qualify within a couple of decades. See, e.g., Hoffman v. Red Owl Stores, Inc., 133 N.W.2d 267, 274-75 (Wis. 1965). [↑](#footnote-ref-172)
172. 181 See, e.g., James Baird Co. v. Gimble Bros., 64 F.2d 344, 345 (2d Cir. 1933); E.I. Du Pont de Nemours & Co. v. Claiborne-Reno Co., 64 F.2d 224, 233 (8th Cir. 1933); James Barclay & Co. v. Bailey, 34 F.Supp. 665, 666 (E.D. Tenn. 1940); Heggen v. Clover Leaf Coal & Mining Co., 253 N.W. 140, 142 (Iowa 1934). [↑](#footnote-ref-173)
173. 182 Recent studies of the availability of promissory estoppel suggest a trend toward judicial support for the doctrine. Sidney W. DeLong, The New Requirement of Enforcement Reliance in Commercial Promissory Estoppel: Section 90 as Catch-22, 1997 WIS. L. REV. 943, 986-87 (finding that most promissory actions failed); Robert A. Hillman, Questioning the "New Consensus" on Promissory Estoppel: An Empirical and Theoretical Study, 98 COLUM. L. REV. 580, 590-91 (1998) (finding that few promissory estoppel claims were successful in contrast to ten times as many contract actions being successful); Phuong N. Pham, Note, The Waning of Promissory Estoppel, 79 CORNELL L. REV. 1263, 1271-73 (1994) (finding from a LEXIS search of New York and California decisions that most promissory estoppel actions were rejected). One wonders whether the academic firestorm rained down upon Gilmore's over-the-top claim that promissory estoppel might swallow up contract law could have in turn caused a judicial overreaction against the use of promissory estoppel, inconsistent with liberal treatment of justifiable reliance in legal history. [↑](#footnote-ref-174)
174. 183 Cf. Harold C. Havighurst, Consideration, Ethics and Administration, 42 COLUM. L. REV. 1, 25 (1942) (describing "qualified language of [section 90]"). [↑](#footnote-ref-175)
175. 184 64 F.2d 344 (2d Cir. 1933). [↑](#footnote-ref-176)
176. 185 Id. at 345. [↑](#footnote-ref-177)
177. 186 Id. [↑](#footnote-ref-178)
178. 187 Id. at 346 (citing section 90's enunciation of promissory estoppel); accord Edwin W. Patterson, The Restatement and the Law of Contracts, 33 COLUM. L. REV. 397, 416-17 (1933) (commenting that section 90 was necessary after the loss of the seal to cover familial and non-commercial promises). [↑](#footnote-ref-179)
179. 188 James Baird Co., 64 F.2d at 346 ("But an offer for an exchange is not meant to become a promise until a consideration has been received . . . ."); Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903). [↑](#footnote-ref-180)
180. 189 Comfort v. McCorkle, 268 N.Y.S. 192, 197-98 (1933). The court cited Holmes' 1903 decision and said that under New York law, Cardozo's decision in Allegheny v. Chautauqua for charitable promises Kent's ruling in Thorne v. Deas had not been disavowed. Id.; Wis. & Mich. Ry. Co. v. Powers, 191 U.S. 379, 386 (1903); Allegheny College v. Nat'l Chautauqua County Bank of Jamestown, 159 N.E. 173, 175 (N.Y. 1927); Thorne v. Deas, 4 Johns. 84, 96-97 (N.Y. Sup. Ct. 1809). [↑](#footnote-ref-181)
181. 190 Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892) (holding bid irrevocable after the plaintiff relied upon it). [↑](#footnote-ref-182)
182. 191 See James Baird Co., 64 F.2d at 344-46. [↑](#footnote-ref-183)
183. 192 See James G. Martin, IV., Note, Contracts -- Promissory Estoppel, 20 VA. L. REV. 214, 218, 220-22 (1933) (saying that promissory estoppel was generally only for charitable subscriptions and rejecting it for other cases, though admitting that reliance harm caused by non-charitable promises ought to be covered). [↑](#footnote-ref-184)
184. 193 T. C. Billig, The Problem of Consideration in Charitable Subscriptions, 12 CORNELL L.Q. 467, 467-68 (1927) (referring to WILLISTON'S 1926 ALI COMMENTARY). [↑](#footnote-ref-185)
185. 194 William H. Page, Consideration: Genuine and Synthetic, 1947 WIS. L. REV. 483, 500-04; accord Note, Contracts -- Promissory Estoppel -- Enforceability of Gratuitous Promises Under Section 90 Restatement of Contracts, 22 MINN. L. REV. 843 (1938). [↑](#footnote-ref-186)
186. 195 Benjamin F. Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 U. PA. L. REV. 459, 462-65 (1950). [↑](#footnote-ref-187)
187. 196 GILMORE, supra note 46, at 66. [↑](#footnote-ref-188)
188. 197 Id. at 66, 130-31 nn.150-52. [↑](#footnote-ref-189)
189. 198 Stanley D. Henderson, Promissory Estoppel and Traditional Contract Doctrine, 78 YALE L.J. 343, 343-44, 350-52, 355-56 (1969). [↑](#footnote-ref-190)
190. 199 WILLISTON, 1936 TREATISE, supra note 59, § 139 n.25 (observing that criticisms of James Baird Co. have been made and "properly so" because "an offer, too, is a promise"). [↑](#footnote-ref-191)
191. 200 Id. [↑](#footnote-ref-192)
192. 201 1 CORBIN, supra note 126, § 193. [↑](#footnote-ref-193)
193. 202 Id. [↑](#footnote-ref-194)
194. 203 Id. [↑](#footnote-ref-195)
195. 204 Id. [↑](#footnote-ref-196)
196. 205 117 F.2d 654 (7th Cir. 1941). [↑](#footnote-ref-197)
197. 206 Id. at 661. [↑](#footnote-ref-198)
198. 207 Id. [↑](#footnote-ref-199)
199. 208 Id. at 655-58. Traynor, J. later cited the Robert Gordon decision for the point that a plaintiff could not reasonably rely if a plaintiff had reason to believe that a defendant's bid was in error, though the Robert Gordon opinion isolated the factors for promissory estoppel of justifiable reliance and "irreparable detriment" and denied relief on a lack of irreparable detriment. Drennan v. Star Paving Co., 333 P.2d 757, 761 (Cal. 1958). [↑](#footnote-ref-200)
200. 209 Robert Gordon, 117 F.2d at 661. [↑](#footnote-ref-201)
201. 210 Id. [↑](#footnote-ref-202)
202. 211 Id. [↑](#footnote-ref-203)
203. 212 E.g., Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958); Fontaine v. Baxley, 17 S.E. 1015 (Ga. 1892); cf. Fuller & Perdue, supra note 127, at 62 ("To encourage reliance we must therefore dispense with its proof."). [↑](#footnote-ref-204)
204. 213 See R.O. Bromagin & Co. v. City of Bloomington, 84 N.E. 700, 702 (Ill. 1908) (relieving contractor of liability on bid because government authority knew of error in bid when it accepted bid). In contrast to Bromagin, the plaintiff in Robert Gordon did not know of the error in the supplier's bid when plaintiff relied. In addition, although the government unit may have seen its way clear to let the plaintiff out from under the erroneous bid, the plaintiff said he would not revoke because "it might injure his reputation as a bidder." Robert Gordon, 117 F.2d at 657. See Malcolm P. Sharp, Pacta Sunt Servanda, 41 COLUM. L. REV. 783, 795 (1941) (remarking on the harm to a party in loss of customers if it is known he revoked a bid). [↑](#footnote-ref-205)
205. 214 333 P.2d 757 (Cal. 1958). [↑](#footnote-ref-206)
206. 215 Nw. Eng'g Co. v. Ellerman, 10 N.W.2d 879 (S.D. 1943); James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933). See also Goodman v. Dicker, 169 F.2d 684, 685 (D.C. Cir. 1948) (granting relief due to reliance on promise of a franchise to distribute radio products). [↑](#footnote-ref-207)
207. 216 Nw. Eng'g Co., 10 N.W.2d at 884. [↑](#footnote-ref-208)
208. 217 Drennan, 333 P.2d at 759-60 (drawing analogy to Restatement section 45 implied fiction, Traynor found a "subsidiary promise" not to revoke). [↑](#footnote-ref-209)
209. 218 Id. at 757-61. Traynor seemed unaware of this decision. [↑](#footnote-ref-210)
210. 219 Id. at 759-61. [↑](#footnote-ref-211)
211. 220 See id.; Henderson, supra note 201, at 343-44, 350-52, 355-56. [↑](#footnote-ref-212)
212. 221 See Henderson, supra note 201, at 343-44, 350-52, 355-56. [↑](#footnote-ref-213)
213. 222 Six of twelve illustrations to Restatement (Second) section 90 involved commercial promises. [↑](#footnote-ref-214)
214. 223 See, e.g., Boyer I, supra note 146, at 649, 665; Benjamin F. Boyer, Promissory Estoppel: Principle from Precedents: II, 50 MICH. L. REV. 873, 873 (1952); Shattuck, supra note 123, at 913-35. [↑](#footnote-ref-215)
215. 224 Cf. Fuller & Perdue, supra note 127, at 52 (commenting that "legal rules can be understood only with reference to the purpose they serve"). [↑](#footnote-ref-216)
216. 225 The use of the term unilateral to identify an offer anticipating acceptance by performance was employed in the first Restatement, and, though it was present in the early discussions about a second restatement, it was ultimately dropped from Restatement (Second) due to the confusion it created. It is used in this study with that proviso. [↑](#footnote-ref-217)
217. 226 See 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 448-49 (Boston, Little, Brown & Co. 5th ed. 1866) (promoting the model of a promise for a promise where "there is an absolute mutuality of engagement, so that each party has the right at once to hold the other to a positive agreement"); LANGDELL, SUMMARY, supra note 16, § 4, at 3-5; WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39; Shattuck, supra note 123, at 938 n.93 (listing applicable cases). [↑](#footnote-ref-218)
218. 227 Treatise writers exerted an unprecedented influence on the organization and direction of common law doctrine starting in the nineteenth century. See A.W.B. Simpson, Innovation in Nineteenth Century Contract Law, 91 L.Q. REV. 247, 252-56 (1975); Kevin M. Teeven, A History of Legislative Reform of the Common Law of Contract, 26 U. TOL. L. REV. 35, 64-66, 69-73 (1994). [↑](#footnote-ref-219)
219. 228 Cf. Shattuck, supra note 123, at 935 (commenting that unilateral offers were usually structured for business purposes). [↑](#footnote-ref-220)
220. 229 12 Johns. 190 (N.Y. Sup. Ct. 1815). [↑](#footnote-ref-221)
221. 230 Id.; see JOHN P. DAWSON, GIFTS AND PROMISES 214 (1980) [hereinafter DAWSON, GIFTS]. [↑](#footnote-ref-222)
222. 231 Tucker, 12 Johns. at 191. [↑](#footnote-ref-223)
223. 232 100 Eng. Rep. 785 (K.B. 1790) [↑](#footnote-ref-224)
224. 233 Tucker, 12 Johns. at 191. [↑](#footnote-ref-225)
225. 234 Cooke, 100 Eng. Rep. at 785-86. [↑](#footnote-ref-226)
226. 235 Id. at 786 (Kenyon, C.J. stated: "At the time of entering into this contract the engagement was all on one side; the other party was not bound; it was therefore a nudum pactum."). [↑](#footnote-ref-227)
227. 236 See Strangborough v. Warner, 74 Eng. Rep. 686 (K.B. 1589) (ruling "promise against a promise will maintain an action"). Simultaneity was obvious in the traditional manner of contract formation involving exchange of promises between the parties in person, but difficulties arose when this model was forced on industrial age contracts made between parties separated by time and space. [↑](#footnote-ref-228)
228. 237 Adams v. Lindsell, 106 Eng. Rep. 250, 251 (K.B. 1818); see Kennedy v. Lee, 36 Eng. Rep. 170, 175 (Ch. 1817) (Chancellor Eldon addressed simultaneity issue raised in Cooke: "If, within a reasonable time of the acceptance being communicated, no variation has been made by either party in the terms of the offer so made and accepted, the acceptance must be taken as simultaneous with the offer."); cf. Routledge v. Grant, 130 Eng. Rep. 920, 923-24 (C.P. 1828) (Best, C.J. volunteered that it would be unacceptable that one party could be bound while the other was not.); Bowen v. Tipton, 1 A. 861, 863-64 (Md. 1885) (ruling that a contract requires consensus reached by the offeree "doing all that he is bound to do"). [↑](#footnote-ref-229)
229. 238 See A.W.B. Simpson, Innovation in Nineteeth Century Contract Law, 91 L.Q. REV. 247, 258-59 (1975). [↑](#footnote-ref-230)
230. 239 In Adams v. Lindsell, Parsons used the consensual notion of an offer being made at every instant, to suggest that the simultaneity of mutuality was fulfilled in a unilateral contract when offeree's act of acceptance was completed because the offeror made "a continuing promise until [the offeree] does the thing required of him." 1 PARSONS, 1853 EDITION, supra note 50, at 451. The introduction into the common law of the foreign offer and acceptance construct, drawn from civil law, raised the possibility that consent might supplant consideration as the central test for contract actionability. However, the introduction of the requirement of mutuality assured hidebound common law traditionalists that the formation requirements of offer and acceptance and consideration would be inextricably intertwined. [↑](#footnote-ref-231)
231. 240 Id. at 449-51 (pointing to need for "an absolute mutuality of engagement"). [↑](#footnote-ref-232)
232. 241 Id. at 450; Kennaway v. Treleavan, 151 Eng. Rep. 211 (Ex. 1839). [↑](#footnote-ref-233)
233. 242 Kennaway, 151 Eng. Rep. at 212. Langdell noted the unilateral nature of guaranty contracts and options. LANGDELL, SUMMARY, supra note 16, § § 107, 179. [↑](#footnote-ref-234)
234. 243 1 PARSONS, 1853 EDITION, supra note 50, at 375 ("Until such engagement or such doing, the promisor may withdraw his promise, because there is no mutuality, and therefore no consideration for it."). [↑](#footnote-ref-235)
235. 244 Id. at 375-76. [↑](#footnote-ref-236)
236. 245 See, e.g., WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39. [↑](#footnote-ref-237)
237. 246 See Sykes v. Dixon, 112 Eng. Rep. 1374 (Q.B. 1839). [↑](#footnote-ref-238)
238. 247 Sykes, 112 Eng. Rep. at 1375. [↑](#footnote-ref-239)
239. 248 Id. (indicating that employer had challenged the sufficiency of the twelve month notice). [↑](#footnote-ref-240)
240. 249 Master and Servant Act, 4 Geo. IV, ch. 34 (1824). [↑](#footnote-ref-241)
241. 250 Sykes, 112 Eng. Rep. at 1376 (citing Young v. Timmins, 148 Eng. Rep. 1446, 1447 (Ex. 1831) (holding that employment contract ran for life, unless employer consented to the ending of employment, was a prohibited "restraint of trade")). [↑](#footnote-ref-242)
242. 251 Sykes, 112 Eng. Rep. at 1377 (concluding that no consideration for long-term employment because employer did not bind himself to employ defendant). In a contract action a decade earlier, a defendant claimed "want of mutuality," but the Massachusetts court ruled for the plaintiff because the plaintiff's part performance in taking the defendant's son onto his premises to train him as a printer created an obligation in the plaintiff to maintain and train the lad. Phelps v. Townsend, 25 Mass. (8 Pick.) 392, 393 (Mass. 1829). [↑](#footnote-ref-243)
243. 252 Judicial reticence to enforce criminal sanctions in these forced labor cases was turned on its head when mutuality was found in an 1862 decision that incarcerated an employee who left service; five years later, the criminal sanction was repealed. See Whittle v. Frankland, 121 Eng. Rep. 992, 994-95 (Q.B. 1862); Master and Servant Act, 30 & 31 Vic., ch. 141 (1867). [↑](#footnote-ref-244)
244. 253 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 449-51 (Boston, Little, Brown & Co., 5th ed. 1866); WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39. Williston would not retract his support for the mutuality requirement until 1921. See 1 WILLISTON, 1921 TREATISE, supra note 48, § 140 (stating mutuality is an unnecessary way of saying there must be consideration and giving guaranty contract as an example). The freedom of contract argument that an offeree was free to negotiate protection for himself in the form of a bilateral contract would be rendered meaningless if the offeror possessed sufficient market leverage to refuse to offer a bilateral contract in order to retain the power of revocation even in the face of offeree's reliance hardship. [↑](#footnote-ref-245)
245. 254 Langdell and Williston took the formalist view that precaution should be taken to protect oneself by negotiation of a bilateral contract. LANGDELL, SUMMARY, supra note 16, § 4; WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39. In a case of an offeror with market power over an offeree, Langdell's suggested solution was disingenuous. [↑](#footnote-ref-246)
246. 255 See generally PARSONS, 1853 EDITION, supra note 50; 1 THEOPHILUS PARSONS, THE LAW OF CONTRACTS (Boston, Little, Brown & Co. 8th ed. 1893). Each scholar flourished during successive generations: Theophilus Parsons (1797-1882); Christopher C. Langdell (1826-1906); Samuel Williston (1861-1963). [↑](#footnote-ref-247)
247. 256 LANGDELL, SUMMARY, supra note 16, § 4 (citing Offord v. Davies, 142 Eng. Rep. 1336 (C.P. 1862). Langdell, ever the logician, disdained upsetting pure principle by reference to equitable concerns. [↑](#footnote-ref-248)
248. 257 LANGDELL, SUMMARY, supra note 16, § 4; cf. Arthur L. Goodhart, Case Law in England and America, in ESSAYS IN JURISPRUDENCE AND THE COMMON LAW 50, 55-56 (1930) (trumpeting that despite occasional judicial admission that a different decision would have been rendered if precedent were different, stare decisis provides certainty even if one must sometimes sacrifice justice). [↑](#footnote-ref-249)
249. 258 Stensgaard v. Smith, 44 N.W. 669, 670 (Minn. 1890); accord Gray v. Hinton, 7 F. 81, 84-85 (C.C.D. Neb. 1881) (stating that an act of acceptance had to be fully performed to make a promise "mutual and obligatory"). [↑](#footnote-ref-250)
250. 259 WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39; accord Recent Case, Offer and Acceptance -- Unilateral Contracts -- Performance Constituting Acceptance, 26 HARV. L. REV. 274, 274 (1912) (asserting that attempts to attain a just result by holding offeror liable upon part performance was wrong because offeror was not bound until the offeree complied with every term of the offer). [↑](#footnote-ref-251)
251. 260 WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39. Despite the fusion of law and equity, the admission of an equitable perspective into a dogmatic common law mind was slow in coming. [↑](#footnote-ref-252)
252. 261 67 P. 1086 (Cal. 1902). [↑](#footnote-ref-253)
253. 262 Id. at 1088; see Blumenthal v. Goodall, 26 P. 906, 907 (Cal. 1891) (stating it would be "height of injustice" to permit offer to be revoked after reliance). A refusal to take into account the hardship of reliance left the offeree with the possibility of recovery in restitution, but unjust enrichment was often absent. See Bigger v. Owen, 5 S.E. 193 (Ga. 1888) (applying mutuality demand strictly); Fuller & Perdue, supra note 127, at 416 (lamenting that offeree of unilateral contract has no way to protect self). A unilateral contract is a stronger case for allowing reliance protection than a firm offer because a unilateral offeree can do nothing to protect himself except to complete performance, but an offeree can accept a firm offer. [↑](#footnote-ref-254)
254. 263 97 S.W. 772 (Ky. 1906). [↑](#footnote-ref-255)
255. 264 Id. at 773; see Plumb v. Campbell, 18 N.E. 790, 792 (Ill. 1888) (concluding that beginning part performance supplied mutuality); Phelps v. Townsend, 25 Mass. (8 Pick.) 392, 393 (1829) (part performance outweighed lack of mutality defense); Cloe v. Rogers, 121 P. 201, 203 (Okla. 1912) (concluding that reliance cost and part performance answered want of mutuality); Williams v. Rogan, 59 Tex. 438, 439 (1883) (citing Parsons' treatise and holding donor "became bound" when part performance of charity fulfilled "mutuality of engagement"); Watkins v. Davison, 112 P. 743, 744 (Wash. 1911) (explaining part performance of unilateral offer solved any mutuality issue); Hopkins v. Racine Malleable & Wrought Iron Co., 119 N.W. 301, 303 (Wis. 1909) (remarking that mutuality was "essential" but "rule has been modified to the extent of performance"). [↑](#footnote-ref-256)
256. 265 See Blumenthal, 26 P. at 907 (emphasizing offeror ought not take advantage of his own wrong); see also Brackenbury v. Hodgkin, 102 A. 106, 107-08 (Me. 1917) (saying offeree "primarily at fault"). [↑](#footnote-ref-257)
257. 266 See Louisville & Nashville R.R. v. Goodnight, 73 Ky. (10 Bush) 552, 554 (1874). [↑](#footnote-ref-258)
258. 267 137 N.W. 769 (Wis. 1912). [↑](#footnote-ref-259)
259. 268 Id. at 771-72. [↑](#footnote-ref-260)
260. 269 Id. at 771-72. Contra Recent Case, supra note 260, at 274 (submitting that Zwolanek v. Baker was wrong to bind offeror when acceptance not pursuant to all terms of offer). See Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892) (remarking that "it would be a fraud" to induce offeree's substantial performance and then revoke); cf. Erskine v. Chevrolet Motors Co., 117 S.E. 706, 712 (N.C. 1923) (asserting manufacturing would be guilty of fraud if it induced performance without intending to perform). [↑](#footnote-ref-261)
261. 270 See, e.g., Vigo Agric. Soc'y v. Brumfiel, 1 N.E. 382, 385-86 (Ind. 1885) (involving theft of plaintiff's property placed with defendant-bailee for an exhibition where defendant negligently failed to station police after assurance of safekeeping); Sunflower Bank v. Pitts, 66 So. 810, 812 (Miss. 1914) (stating that bank was a "wrongdoer" to sell land, while plaintiff was agent to sell it, at price below the minimum price at which the bank said that neither it nor the agent could sell it). [↑](#footnote-ref-262)
262. 271 See, e.g., A.B. Dick Co. v. Fuller, 213 F. 98, 102-03 (S.D.N.Y. 1914); Quick v. Wheeler, 78 N.Y. 300, 304-05 (1879). [↑](#footnote-ref-263)
263. 272 See, e.g., Miller v. Moffat, 153 Ill. App. 1, 6 (1910). [↑](#footnote-ref-264)
264. 273 78 N.Y. 300 (1879) (concerning plaintiff's agreement to deliver lumber that he could accumulate over the winter). [↑](#footnote-ref-265)
265. 274 Id. at 300-01. [↑](#footnote-ref-266)
266. 275 Id. at 304-05. [↑](#footnote-ref-267)
267. 276 See A.B. Dick Co. v. Fuller, 213 F. 98, 102-03 (S.D.N.Y. 1914) (finding offer to pay inventor for his efforts in working on inventions for benefit of offeror was binding). [↑](#footnote-ref-268)
268. 277 See Hopkins v. Racine Malleable & Wrought Iron Co., 119 N.W. 301, 303 (Wis. 1909) (involving defendant who refused to continue to sell at fixed price set in his offer to sell iron castings over life of plaintiff's patent). In the case of the ongoing series of tasks that an agent is expected to perform on behalf of his principal, a principal has the power to end the agency if he loses confidence in his agent, but the principal may have to pay damages if he does not have the right to do so. See Sunflower Bank v. Pitts, 66 So. 810, 811-12 (Miss. 1914); Cloe v. Rogers, 121 P. 201, 203-04 (Okla. 1912). [↑](#footnote-ref-269)
269. 278 Miller v. Moffat, 153 Ill. App. 1, 6 (1910). [↑](#footnote-ref-270)
270. 279 Id. at 3-4. [↑](#footnote-ref-271)
271. 280 Id. at 5-6. [↑](#footnote-ref-272)
272. 281 209 S.W. 247 (Tex. Civ. App. 1918). [↑](#footnote-ref-273)
273. 282 Id. at 251. [↑](#footnote-ref-274)
274. 283 Id.; cf. Los Angeles Traction Co. v. Wilshire, 67 P. 1086, 1087-88 (Cal. 1902) (raising question of whether contractor's slow start was an adequate part performance, but ruling that enough was performed along with reliance cost of paying substantial city franchise fee to bar revocation). [↑](#footnote-ref-275)
275. 284 Cloe, 121 P. at 203; cf. Brown v. Marion Commercial Club, 97 N.E. 958, 961 (Ind. Ct. App. 1912) (ruling that, despite lack of subsidy commitments to industries to move to the community, binding reliance found in fellow subscribers obligating themselves to contributions per business subscription); Taylor v. Ewing, 132 P. 1009, 1011 (Wash. 1913) (finding mutuality in assignment for benefit of creditors by obtaining assignment of thirty-eight of forty creditors). [↑](#footnote-ref-276)
276. 285 See, e.g., Axe v. Tolbert, 146 N.W. 418, 420 (Mich. 1914) (holding that although attorney claimed real estate firm obtained "options" to sell farms, offerree's intent was to grant the firm agency authority); Watkins v. Davison, 112 P. 743, 744 (Wash. 1911) (holding that although attorney claimed seller gave "unilateral acceptance," actually was a unilateral offer); cf. G. Ober & Sons Co. v. Katzenstein, 76 S.E. 476, 477-78 (N.C. 1912) (calling at-will contract an option to cancel). [↑](#footnote-ref-277)
277. 286 See Curry v. Ky. W. Ry., 78 S.W. 435, 436 (Ky. 1904). Equitable estoppel bars a person from claiming that the true facts are different from what he misrepresented them to be, but promissory estoppel supports enforcement of a promise for future performance. See infra notes 375-81 and accompanying text. [↑](#footnote-ref-278)
278. 287 See, e.g., WILLISTON'S WALD'S POLLOCK, supra note 1 at 34 n.39; 1 WILLISTON, 1921 TREATISE, supra note 48, § 140. [↑](#footnote-ref-279)
279. 288 See Arthur L. Corbin, The Effect of Options on Consideration, 34 YALE L.J. 571, 573, 586-87 (1925) (asserting that the idea that both parties must be bound or neither is bound was never true of unilateral contracts). Williston would not insist on the inclusion of mutuality in the Restatement. See 1 WILLISTON, 1921 TREATISE, supra note 48, § 140 (acknowledging that mutuality is unnecessary way of saying there must be consideration). [↑](#footnote-ref-280)
280. 289 See Stensgaard v. Smith, 44 N.W. 669, 670 (Minn. 1890); Gray v. Hinton, 7 F. 81, 84-85 (C.C.D. Neb. 1881); 1 PARSONS, 1853 EDITION, supra note 50, at 374-76 (stressing the lack of both consideration and mutuality). But cf. Am. Publ'g & Engraving Co. v. Walker, 87 Mo. App. 503, 507-09 (1901) (explaining that part performance overcame defense that unilateral contract and not binding); Spitzli v. Guth, 183 N.Y.S. 743, 747 (N.Y. Sup. Ct. 1920) (stating that option, which may have been void, was binding because reliance cured lack of mutuality and consideration). [↑](#footnote-ref-281)
281. 290 The first Restatement employs terms unilateral and bilateral, but they were abandoned in Restatement (Second). See RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981); RESTATEMENT OF THE LAW OF CONTRACTS § 12 cmt. b (1932) (stating mutuality doctrine was wrong). [↑](#footnote-ref-282)
282. 291 See, e.g., Los Angeles Traction Co. v. Wilshire, 67 P. 1086, 1088 (Cal. 1902) (stating that part performance barred revocation and also converted unilateral into bilateral contract); Buick Motor Co. v. Thompson, 75 S.E. 354, 356 (Ga. 1912); Plumb v. Campbell, 18 N.E. 790, 792 (Ill. 1888); Edwards v. Roberts, 209 S.W. 247, 251 (Tex. Civ. App. 1918) (saying the contract ceased to be unilateral contract and became bilateral). [↑](#footnote-ref-283)
283. 292 Plumb, 18 N.E. at 792 (citing Parsons' mutuality ideas). [↑](#footnote-ref-284)
284. 293 Cf. WILLISTON, 1921 TREATISE, supra note 48, § 60 (arguing that if part performance is enough to convert unilateral into bilateral contract, then offeror was being denied right to dictate the terms of his offer). The classifications of unilateral and bilateral were dropped from the Restatement (Second) because of the confusion they caused. [↑](#footnote-ref-285)
285. 294 See, e.g., Am. Publ'g & Engraving Co., 87 Mo. App. at 509 (stating part performance cured statute of frauds and unilateral objections); cf. Wynn v. Garland, 19 Ark. 23, 35-36 (1857) (commenting that part performance cured statute of frauds and mutuality concerns); Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892). The inclination to equate the statute of frauds part performance exception with the reliance needed to bar revocation of a unilateral contract is perhaps not surprising in a license case like Wynn v. Garland because the statute of frauds part performance exception, created to avert a fraudulent invocation of the statute, influenced early cases that provided justifiable reliance relief in land license and easement cases. [↑](#footnote-ref-286)
286. 295 See supra note 265 and accompanying text. [↑](#footnote-ref-287)
287. 296 LANGDELL, SUMMARY, supra note 16, § 4; WILLISTON'S WALD'S POLLOCK, supra note 1, at 34 n.39; 1 WILLISTON, 1921 TREATISE, supra note 48, § 60a (arguing that no clear theory in decisions that held offeror bound); cf. id. § 140 (admitting that mutuality is never present in a unilateral contract and that mutuality is unnecessary way of saying there must be consideration). [↑](#footnote-ref-288)
288. 297 See Ashley, supra note 123, at 161, 165-66 (noting constant effort to devise way out of the difficulty that consideration is not given until offeree's act completed). Ashley thought perhaps legislation would be necessary. Id. at 159. [↑](#footnote-ref-289)
289. 298 Id. at 165 (citing as example Los Angeles Traction Co. v. Wilshire, 67 P. 1086 (Cal. 1902)). [↑](#footnote-ref-290)
290. 299 Id. at 166. [↑](#footnote-ref-291)
291. 300 Id. at 168. [↑](#footnote-ref-292)
292. 301 McGovney, supra note 125, at 659. [↑](#footnote-ref-293)
293. 302 Id. at 657. [↑](#footnote-ref-294)
294. 303 Ashley, supra note 123, at 164 (asking by what "magic" a unilateral contract becomes a bilateral contract); McGovney, supra note 125, at 658-59. [↑](#footnote-ref-295)
295. 304 Cornelson v. Sun Mut. Ins. Co., 7 La. Ann. 345, 347 (1852). McGovney also mentioned dicta in well known English and American decisions, though both decisions offered the solution he opposed of offeree being bound as well at part performance. McGovney, supra note 125, at 656; see Offord v. Davies, 142 Eng. Rep. 1336, 1338 (C.A. 1862) (commenting that offeror of guaranty contract bound upon creditor's part performance); Plumb v. Campbell, 18 N.E. 790, 792 (Ill. 1888) (stating part performance binds offeror and provides mutuality). [↑](#footnote-ref-296)
296. 305 FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 26 (8th ed. 1911). [↑](#footnote-ref-297)
297. 306 Id. [↑](#footnote-ref-298)
298. 307 Id. [↑](#footnote-ref-299)
299. 308 McGovney, supra note 125, at 658. [↑](#footnote-ref-300)
300. 309 Cf. RESTATEMENT OF THE LAW OF CONTRACTS § 45 (1932) (stating that offeror's obligation at part performance was "conditional on the full consideration being given" by offeree in timely fashion). [↑](#footnote-ref-301)
301. 310 McGovney, supra note 125, at 658. McGovney's borrowing from a 1852 Louisiana dissent exemplified nineteenth century practice of looking outside a closed system of precedent to find solutions to market problems in civil law. See A.W.B. Simpson, Innovation in Nineteenth Century Contract Law, 91 L.Q. REV. 247, 258-78 (1975). [↑](#footnote-ref-302)
302. 311 Id. at 659. [↑](#footnote-ref-303)
303. 312 The civilian implication of terms to contracts generally are found in the law regarding merchantability, impossibility and good faith. See KEVIN M. TEEVEN, A HISTORY OF THE ANGLO-AMERICAN COMMON LAW OF CONTRACT 139, 232-35, 309 (1990). [↑](#footnote-ref-304)
304. 313 McGovney, supra note 125, at 659. Part performance provided consideration for subsidiary promise. Id. at 662. [↑](#footnote-ref-305)
305. 314 Id. at 659-60. McGovney held up the true option contract as a model for treatment of part performance of unilateral contracts. Id. at 648. He discredited the notion of "meeting of the minds," which denied the viability of an irrevocable offer, by pointing out that an option contract never complied with that overused claim. Id. at 650. [↑](#footnote-ref-306)
306. 315 Id. at 660. [↑](#footnote-ref-307)
307. 316 RESTATEMENT (SECOND) OF CONTRACTS § 45 (1981). [↑](#footnote-ref-308)
308. 317 Arthur L. Corbin, Offer and Acceptance and Some of the Resulting Legal Relations, 26 YALE L.J. 169 (1917) [hereinafter Corbin, Offer and Acceptance]. [↑](#footnote-ref-309)
309. 318 Id. at 192. The custom of saying both parties must be bound or neither is bound only applies to bilateral contracts. Id. at 196. [↑](#footnote-ref-310)
310. 319 Id. at 195. [↑](#footnote-ref-311)
311. 320 Id. Corbin also noted that "a similar provision exists in the German Civil Code, sec. 658." Id. at 195 n.53; see Pound, Consideration in Equity, supra note 32, at 443 (asserting that McGovney's implied collateral promise "is but a dogmatic fiction"). [↑](#footnote-ref-312)
312. 321 Corbin, Offer and Acceptance, supra note 318, at 189. [↑](#footnote-ref-313)
313. 322 1 WILLISTON, 1921 TREATISE, supra note 48, § 60 (criticizing artificiality of solution). [↑](#footnote-ref-314)
314. 323 Id. Corbin supported irrevocability of offer on the grounds of policy, convenience and general advantage. Corbin, Offer and Acceptance, supra note 318, at 185-86, 195. [↑](#footnote-ref-315)
315. 324 Corbin, Offer and Acceptance, supra note 318, at 185 & n.28; see also LANGDELL, SUMMARY, supra note 16, § 4; cf. Holmes, Book Notice, supra note 62, at 234 (criticizing Langdell's "formal" logic that treated as irrelevant contractors' experiences and needs). [↑](#footnote-ref-316)
316. 325 Ashley, supra note 123, at 168; Corbin, Offer and Acceptance, supra note 318, at 196-97; McGovney, supra note 125, at 661. [↑](#footnote-ref-317)
317. 326 Williston and Corbin were obvious choices, but McGovney's selection surely reflected the importance of the doctrinal concerns of the time regarding the status of unilateral contracts and the deleterious impact of the mutuality requirement. [↑](#footnote-ref-318)
318. 327 RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. b (1932). The modern English common law position is that a unilateral offer is irrevocable after performance begins if a court's reading of the contract itself indicates that was the offeror's intent, leaving open the possibility that an offeror could revoke after performance began if that was found to be the offeror's intent. See M. P. FURMSTON, CHESHIRE, FIFOOT AND FURMSTON'S LAW OF CONTRACT 64-66 (14th ed. 2001). [↑](#footnote-ref-319)
319. 328 See RESTATEMENT OF THE LAW OF CONTACTS § 12 cmt. b (1932); accord RESTATEMENT (SECOND) OF CONTRACTS § 79 cmt. f (1981) (elaborating that the requirement that both parties be bound was inapplicable to unilateral contracts, reliance-based obligations, moral obligation and negotiable instruments). [↑](#footnote-ref-320)
320. 329 FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 26 (8th ed. 1911); see RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. e (1981); RESTATEMENT OF THE LAW OF CONTRACTS § 45 (1932). [↑](#footnote-ref-321)
321. 330 See RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. f (1981); RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. a (1932). [↑](#footnote-ref-322)
322. 331 RESTATEMENT OF THE LAW OF CONTRACTS § 45 cmt. b (1932) (referencing section 90); cf. RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. b (1981) (commenting that section 45 is designed to protect justifiable reliance). Comment e to Restatement (Second) section 45 states the proposition that mere preparation of performance does not preclude revocation but substantial preparations may be enough under the option contract provisions in section 87(2). RESTATEMENT (SECOND) OF CONTRACTS § 45 cmt. e (1981); see RESTATEMENT (SECOND) OF CONTRACTS § 87(2) (1981) (indicating that substantial reliance may support option contract); cf. Shattuck, supra note 123, at 939 (commenting that when work done in reliance on offer, a statement regarding the presence of reliance has become formulaic). [↑](#footnote-ref-323)
323. 332 McGovney, supra note 125, at 659-60. [↑](#footnote-ref-324)
324. 334 McGovney, supra note 123, at 659-60. [↑](#footnote-ref-325)
325. 335 RESTATEMENT OF THE LAW OF CONTRACTS § 12 cmt. b (1932); RESTATEMENT (SECOND) OF CONTRACTS § 50 (1981) (replacing old terms with "acceptance by performance" and "acceptance by promise"). [↑](#footnote-ref-326)
326. 336 See Robert Braucher, Offer and Acceptance in the Second Restatement, 74 YALE L.J. 302, 304 (1964) (explaining that initially the drafters considered retaining the terminology unilateral and bilateral in light of the value of term the "unilateral" in identifying a promise that could be binding on the promisor but not the promisee). [↑](#footnote-ref-327)
327. 337 Offers for both options and guaranties share the requirement that reliance be substantial. See RESTATEMENT (SECOND) OF CONTRACTS § § 87, 88(c) (1981). As to a written guaranty, reliance is extremely probable in a "commercial context." Id. at § 88 cmt. d. The provisions in Sections 87 and 88 were not in the first Restatement. [↑](#footnote-ref-328)
328. 338 See Fuller & Perdue, supra note 127, at 416 (explaining that when an offer is "firm," there is a stated period of irrevocability to distinguish it from other types of options); U.C.C. § 2-205 cmt. 4 (1952) (clarifying that "firm" offer is not a long-term option in modern usage). Not all option offers make assurances of irrevocability of the offer like a firm offer does, but if there is reliance on an option or a firm offer, the result is the same. [↑](#footnote-ref-329)
329. 339 See UNIFORM REVISED SALES ACT (Sales Chapter of Proposed Commercial Code), Proposed Final Draft No. 1, § 18 cmt. (1944). (In the comment, a note was made that firm offers were so relied upon by merchants that they rarely came into case law, and when they did, it was because of "revocation in bad faith." Karl Llewellyn served as reporter.); Schultz, supra note 168, at 245-46 & n.25 (discussing Louisiana case that remanded for proof on whether trade custom was that firm offer irrevocable); 1 CORBIN, supra note 126, § 43; cf. U.C.C. § 1-205 cmt. 4 (1952) (stating custom may not replace established legal rules); cf. DAWSON, GIFTS, supra note 231, at 207 (explaining that consideration concerns contract formation but has been confused with irrevocable offers and contract discharge). [↑](#footnote-ref-330)
330. 340 E.g., Fontaine v. Baxley, 17 S.E. 1015, 1017-18 (Ga. 1892); Work v. Welsh, 43 N.E. 719, 721 (Ill. 1896). [↑](#footnote-ref-331)
331. 341 This potential difference is reflected in the stance of the Restatement (Second) that substantial reliance is sufficient for an option but part performance is required for other types of unilateral contracts. RESTATEMENT (SECOND) OF CONTRACTS § § 45, 87(2) (1981). [↑](#footnote-ref-332)
332. 343 Id. at 568-69 (noting that examination costs of $ 25 per day were incurred on property that was offered at $ 200,000). [↑](#footnote-ref-333)
333. 345 Id. at 745; see also Work, 43 N.E. at 721 (noting that the land had been improved substantially in reliance on offer to convey). [↑](#footnote-ref-334)
334. 346 Corbin, Offer and Acceptance, supra note 318, at 189; Wilson, 223 S.W. at 568-69 (ruling examination of land subsequent to forty-five day option was consideration); Spitzli, 183 N.Y.S. at 747 (ruling that improvements, of which the lessor was aware, provided "consideration which related back to the original agreement"); see Work, 43 N.E. at 721. [↑](#footnote-ref-335)
335. 347 Spitzli, 183 N.Y.S. at 748 (citing recent ground-breaking New York decision Simon v. Etgen, 107 N.E. 1066 (N.Y. 1915)); cf. Pryor v. Cain, 25 Ill. 292 (1861) (stating that promisor "is bound in good faith" because of reliance). [↑](#footnote-ref-336)
336. 348 Spitzli, 183 N.Y.S. at 748 (holding that it would have been unjust to allow the lessor to take property back based on an unenforceable option). [↑](#footnote-ref-337)
337. 349 E.g., James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933); Drennan v. Star Paving Co., 333 P.2d 757 (Cal. 1958); Nw. Eng'g Co. v. Ellerman, 10 N.W.2d 879 (S.D. 1943). [↑](#footnote-ref-338)
338. 350 17 S.E. 1015 (Ga. 1892). A bid at an auction is a revocable offer revocable until accepted. See Payne v. Cave, 100 Eng. Rep. 502 (K.B. 1789). [↑](#footnote-ref-339)
339. 351 Fontaine, 17 S.E. at 1015-16. The court inartfully said the parties had an "agreement" but that manufacturer's promise to meet buyer's requirements was a unilateral promise because the offeror could withdraw before the offer was acted upon; subsequent to reliance, however, manufacturer was obliged to supply as many ties as buyer-counterclaimant "might need." Id. at 1017-18. Fontaine v. Baxley also involved a counterclaim; the manufacturer had sued for a modest amount due on an earlier delivery, but the issue on appeal concerned defendant's counterclaim in recoupment for reliance harm suffered in connection with bids submitted to railway companies. Id. at 1015. [↑](#footnote-ref-340)
340. 352 Id. at 1018. Much like the subcontractor in Drennan, the manufacturer in Fontaine did not bargain for the reliance of submitting a bid to railways. Id.; see Drennan, 333 P.2d at 759-60. Nevertheless, the manufacturer had reason to expect his bid to be incorporated in the bids to railways. Fontaine, 17 S.E. at 1018. [↑](#footnote-ref-341)
341. 353 Fontaine, 17 S.E. at 1017-18. The damages measure was the quantity Fontaine could succeed in pre-engaging within one year. Id. at 1018. [↑](#footnote-ref-342)
342. 354 Id. at 1018. [↑](#footnote-ref-343)
343. 355 Id. The court emphasized that counterclaimant had no alternative supply readily available in the market. Id. [↑](#footnote-ref-344)
344. 356 Id. As to the three bids, he had assurances that he had submitted the lowest bid. Id. A court would have to determine whether reliance was sufficient. Id. If an offer is for a potential series of unilateral contracts, reliance on one does not bind the offeror to remaining transactions in series. See Hopkins v. Racine Malleable & Wrought Iron Co., 119 N.W. 301, 303 (Wis. 1909). [↑](#footnote-ref-345)
345. 357 E.g., Le Fevre v. Le Fevre, 4 Serg. & Rawle 241, 244 (Pa. 1818); Halfpenny v. Ballet, 23 Eng. Rep. 836 (Ch. 1699); Butcher v. Stapley, 23 Eng. Rep. 524 (Ch. 1685); Thynn v. Thynn, 23 Eng. Rep. 479 (Ch. 1684). See also SIMPSON, supra note 2, at 616. The court in Fontaine v. Baxley said it would be a fraud to repudiate after reliance and that this part performance satisfied both mutuality and the statute of frauds. Fontaine, 17 S.E. at 1018. [↑](#footnote-ref-346)
346. 358 Drennan v. Star Paving Co., 333 P.2d 757, 760 (Cal. 1958) (stating a contractor had reason to expect his bid to be incorporated in a general contractor's bid). [↑](#footnote-ref-347)
347. 359 The court in Fontaine suggested that a victimized offeree was bound to order all the railway ties needed from the offeror-manufacturer. Fontaine, 17 S.E. at 1018. Although this solution was flawed in theory, because a unilateral offeree was not bound to complete a deal with the offeror, it did provide a lead for legislatures to consider. See 1 CORBIN, supra note 126, § 46 (discussing statutory and civil treatment of some bids as irrevocable). A mid-twentieth century survey of Indiana contractors' sense of fair play indicated that sixty-five of eighty contractors surveyed felt obliged to contract with the subcontractor if awarded the contract. See Schultz, supra note 168, at 260. [↑](#footnote-ref-348)
348. 360 64 F.2d 344, 346 (2d Cir. 1933). [↑](#footnote-ref-349)
349. 361 See ALI COMMENTARIES 1926, supra note 19, at 20; RESTATEMENT OF THE LAW OF CONTRACTS § 75 cmt. c (1932). [↑](#footnote-ref-350)
350. 362 Drennan, 333 P.2d at 760. [↑](#footnote-ref-351)
351. 363 James Baird Co., 64 F.2d at 346. [↑](#footnote-ref-352)
352. 364 In a 1944 preliminary draft leading to U.C.C. Section 2-205, Reporter Llewellyn proposed a statutory firm offer rule. UNIFORM REVISED SALES ACT (Sales Chapter of Proposed Commercial Code), Proposed Final Draft No. 1 (1944). [↑](#footnote-ref-353)
353. 365 See 1 CORBIN, supra note 126, § 46 (noting statutes as early as 1914 in Maryland and 1941 in New York, and the civil rule of irrevocability for deliberate promises); see also Armed Services Procurement Regulation § 2-203, 32 C.F.R. § 401.303 (1951) (barring revocation of bid to United States Government). [↑](#footnote-ref-354)
354. 366 See supra note 243 and accompanying text. [↑](#footnote-ref-355)
355. 367 Kennaway v. Treleavan, 151 Eng. Rep. 211, 212 (Ex. 1839). [↑](#footnote-ref-356)
356. 368 Id.; accord Whittle v. Frankland, 121 Eng. Rep. 992, 994-95 (K.B. 1862) (Crompton, J. stated in dictum in this criminal case that: "I never could understand that mutuality doctrine," as in case of a guaranty where the only question is about consideration.). [↑](#footnote-ref-357)
357. 369 142 Eng. Rep. 1336, 1340 (C.P. 1862). [↑](#footnote-ref-358)
358. 370 Id. [↑](#footnote-ref-359)
359. 371 1 PARSONS, 1853 EDITION, supra note 50, at 374-76. [↑](#footnote-ref-360)
360. 372 LANGDELL, SUMMARY, supra note 16, § 4. [↑](#footnote-ref-361)
361. 373 Id. [↑](#footnote-ref-362)
362. 374 See, e.g., Rice v. Almy, 32 Conn. 297, 304 (1864); Litzelman v. Howell, 20 Ill. App. 588, 589-90 (1886); Winham v. Crutcher, 78 Tenn. 610, 615, 623-25 (1882). [↑](#footnote-ref-363)
363. 376 Rice, 32 Conn. at 301-02. [↑](#footnote-ref-364)
364. 377 Id. at 304 (estoppel in pais). [↑](#footnote-ref-365)
365. 378 Id. at 307-08 n. (disagreeing that equitable estoppel could enforce an agreement if consideration was not also present). [↑](#footnote-ref-366)
366. 379 Id. at 304 (asserting that if "promise induces the promisee" to act, there is sufficient consideration); see BIGELOW, supra note 102, at 441; CORBIN'S ANSON 1924, supra note 13, at 129 n.2; WILLISTON'S WALD'S POLLOCK, supra note 17, at 186-87 n.(d). [↑](#footnote-ref-367)
367. 380 Rice, 32 Conn. at 306 n. The reporter admitted, however, that this form of consideration was sometimes found. Id. at 307-08 (stating consideration and estoppel "perfectly coinciding here"). [↑](#footnote-ref-368)
368. 381 142 Eng. Rep. 1336 (C.P. 1862). [↑](#footnote-ref-369)
369. 382 Id. at 1336-37. [↑](#footnote-ref-370)
370. 383 Id. [↑](#footnote-ref-371)
371. 384 Id. at 1336. The opinion contained the oft-quoted hypothetical discussed by Justices Williams and Erle about the guaranty to a manufacturer of buyer's payment for a carriage. Id. The conclusion was reached that the guarantor could revoke up to the point when the manufacturer had prepared materials for manufacture of carriage. Id. at 1338 (citing Parsons' treatise, characterized as an American work of considerable authority). [↑](#footnote-ref-372)
372. 385 Id. at 1340. See Fuller & Perdue, supra note 127, at 414 (pointing out that Offord court took "middle ground" by allowing revocation of extensions not made); cf. RESTATEMENT (SECOND) OF CONTRACTS § 88 cmt. d (1981) (commenting that typical remedy is performance of guaranty, thus avoiding measurement difficulties). [↑](#footnote-ref-373)
373. 386 204 Mass. 362 (1910). [↑](#footnote-ref-374)
374. 387 Id. at 375-76. [↑](#footnote-ref-375)
375. 388 In Gelpcke v. Quentell, a New York court considered the case of a debtor who relied by drawing on a letter of credit before receipt of notification of guarantor's revocation; the creditor then honored the draw despite having received notice of the revocation. In a three to two decision, the New York court held guarantor was bound because creditor was obliged to debtor for reliance before notice was received. Gelpcke v. Quentell, 74 N.Y. 599, 599 (1878). See also RESTATEMENT (SECOND) OF CONTRACTS § 88(c) (1981) (stating that surety bound for inducing substantial reliance by promisee or third party). [↑](#footnote-ref-376)
376. 389 Furthermore, as in unilateral contracts, an at-will agreement does not become a contract if performance does not in fact commence. See id. § 50(2). [↑](#footnote-ref-377)
377. 390 E.g., G. Ober & Sons v. Katzenstein, 76 S.E. 476 (N.C. 1912) (concerning revocable purchase order); Caddo ***Oil*** & Mining Co. v. Producers ***Oil***, 64 So. 684 (La. 1913) (concerning ***oil*** drilling lease). [↑](#footnote-ref-378)
378. 391 Kent followed Blackstone's description of employment contracts running year-to-year. 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 415 (Oxford, Clarendon Press 1765); 2 JAMES KENT, COMMENTARIES ON AMERICAN LAW 258-59 (New York, O. Halsted 2d ed. 1832). [↑](#footnote-ref-379)
379. 392 HORACE G. WOOD, MASTER AND SERVANT § 134 (Albany, J. D. Parsons, Jr. 1877); see Jay M. Feinman, The Development of the Employment At Will Rule, 20 AM. J. LEG. HIST. 118, 126-30 (1976). [↑](#footnote-ref-380)
380. 393 WOOD, supra note 393, § 134. [↑](#footnote-ref-381)
381. 394 See Feinman, supra note 393, at 126; see also 1 WILLISTON, 1921 TREATISE, supra note 48, § 39 (regretting failure of courts to follow true contract principles). [↑](#footnote-ref-382)
382. 395 See Raymond v. White, 78 N.W. 469, 471 (Mich. 1899) (accepting that employee could be terminated at any time); Feinman, supra note 393, at 126-34; 1 WILLISTON, 1921 TREATISE, supra note 48, § 39 (admitting universality of at-will rule in the United States). "Permanent" or "for life" employment interpreted as at-will unilateral undertaking. See 9 WILLISTON, 1936 TREATISE, supra note 59, § 1017. [↑](#footnote-ref-383)
383. 396 See Bassick Mfg. Co. v. Riley, 9 F.2d 138, 138-39 (E.D. Pa. 1925); 4 WILLISTON, 1936 TREATISE, supra note 59, § 1027A (stating that under influence of simpler master and servant relation, where it was harder to raise mutual obligations and detrimental reliance, sales agencies and distributorships have been found to be at will). [↑](#footnote-ref-384)
384. 397 See, e.g., Buick Motor Co. v. Thompson, 75 S.E. 354, 354-55 (Ga. 1912) (giving ten day notice for termination); Courier-Journal Co. v. Miller, 50 S.W. 46, 47 (Ky. 1899) (interpreting agency to sell newspapers to allow discharge "at any time without cause"); Alexander v. Capitol Paint Co., 111 A. 140, 144-45 (Md. 1920) (saying ordinary brokerage with no time strictures may be terminated at-will). [↑](#footnote-ref-385)
385. 398 See Kelly-Springfield Tire Co. v. Bobo, 4 F.2d 71, 72 (9th Cir. 1925); Carlson v. Stone-Ordean-Wells Co., 107 P. 419, 422 (Mont. 1910); 9 WILLISTON, 1936 TREATISE, supra note 59, § 1017A (stating that for the purpose of determining termination of relations, they "are essentially the same, and cases of either type are authoritative on this point for the other."). The notion of revocable agency relations, when ownership of goods did not pass, had been extended to distributorships and franchises where ownership of producer's goods did pass. Id. [↑](#footnote-ref-386)
386. 399 44 A. 300 (N.H. 1895). [↑](#footnote-ref-387)
387. 400 Id. [↑](#footnote-ref-388)
388. 401 Id. at 301 (allowing concern for reliance harm to outweigh concern over restraint of trade). [↑](#footnote-ref-389)
389. 402 Carlson v. Stone-Ordean-Wells Co., 107 P. 419, 422 (Mont. 1910). [↑](#footnote-ref-390)
390. 403 Id. The inspiration for holding defendant to what parties must have contemplated was the civilian consensual theory. See 1 ROBERT J. POTHIER, A TREATISE ON THE LAW OF OBLIGATIONS 4 (1761) (William Evans trans. & ed., 1806) ("concurrence of intention in two parties"). [↑](#footnote-ref-391)
391. 404 See J. R. Watkins Co. v. Rich, 235 N.W. 845, 846 (Mich. 1931) (expressing that when terminating an at-will "relationship that is commercial . . . the option may be exercised only in good faith"); Automobile Dealers Day in Court, 15 U.S.C. § 1221 (1956); Petroleum Marketing Practices Act of 1978, 15 U.S.C. § 2801 (6) (gasoline distributors); New Jersey Franchise Practices Act, N.J. STAT. ANN. § § 56:10-5, 56:10-7 (West. 1983); Massachusetts Fair Dealing Act, MASS. GEN. LAWS ANN. ch. 93A, 93B (1971). [↑](#footnote-ref-392)
392. 405 Buick Motor Co. v. Thompson, 75 S.E. 354, 354 (Ga. 1912). [↑](#footnote-ref-393)
393. 406 Id. at 356. The transaction can be characterized as an at-will contract or, in the alternative, a series of possible unilateral contracts because defendant offered to pay plaintiff difference between list and retail price for orders he obtained. Id. at 354. [↑](#footnote-ref-394)
394. 407 117 S.E. 706 (N.C. 1923). [↑](#footnote-ref-395)
395. 408 Id. at 711. [↑](#footnote-ref-396)
396. 409 Id. at 710. [↑](#footnote-ref-397)
397. 410 Id. [↑](#footnote-ref-398)
398. 411 Id. at 710. In a parallel 1954 California decision, a court held a producer bound to a one year relationship with plaintiff on an oral contract of indefinite duration because plaintiff relied on assurances of producer's representative that producer was a well-meaning company that did not arbitrarily terminate distributors. J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F.Supp. 484, 488, 493 (N.D. Cal. 1954). [↑](#footnote-ref-399)
399. 412 Erskine, 117 S.E. at 710. "Stronger or more effective inducement could not have been held out . . . ." Id. at 712. The primary emphasis in rationale was on reliance on oral modification which assured no arbitrary cancellation, but the court did not preclude the interpretation that reliance on an at-will written contract would have been sufficient. See id. at 714 (stating that reliance was incurred upon oral assurances and "not necessarily upon the written contracts"). [↑](#footnote-ref-400)
400. 413 Id. at 713. Shades of equitable estoppel logic were present but then extended to a promise regarding future action. [↑](#footnote-ref-401)
401. 414 Id. The emphasis on deceit harks back to tort origins of both assumpsit and justifiable reliance. [↑](#footnote-ref-402)
402. 415 Cf. Harris v. Brown, 51 A. 586, 587 (Pa. 1902); Bassick Mfg. Co. v. Riley, 9 F.2d 138, 138 (E.D. Pa. 1925) (concluding that when insufficient proof of whether relationship was for a term or at-will, the presumption is at-will). The Erskine court noted with disdain the string of reported cases cited by Chevrolet that permitted auto manufacturers to victimize dealers by inducing reliance hardship. Erskine, 117 S.E. at 711. [↑](#footnote-ref-403)
403. 416 See, e.g., Jack's Cookie Co. v. Brooks, 227 F.2d 935, 938-39 (4th Cir. 1955); Bassick Mfg. Co. v. Riley, 9 F.2d 138, 139 (E.D. Pa. 1925); J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F.Supp. 484, 493 (N.D. Cal. 1954) (applying California law). [↑](#footnote-ref-404)
404. 417 Rerick v. ***Kern***, 14 Serg. & Rawle 267 (Pa. 1826). [↑](#footnote-ref-405)
405. 418 Id. at 272; accord Le Fevre v. Le Fevre, 4 Serg. & Rawle 241, 244-45 (Pa. 1818). Wynn v. Garland cited Rerick as authority in a similar case of reliance on a license which, if revoked, would have caused irreparable damage. Wynn v. Garland, 19 Ark. 23, 33-34, 38 (1857) (stating licensor cannot revoke after licensee "reposed . . . confidence" in the "good faith" of licensor). See Pound, Consideration in Equity, supra note 32, at 443 (observing that courts will prevent an "unconscionable revocation" in the case of reliance by treating a license as an easement). [↑](#footnote-ref-406)
406. 419 Rerick, 14 Serg. & Rawle at 268. See Brown v. Hoag, 29 N.W. 135, 137 (Minn. 1886) (noting that part performance exception to statute of frauds "rests upon the principle of fraud, and proceeds upon the idea that the party has so changed his situation, on the faith of the oral agreement, that it would be a fraud upon him to permit the other party to defeat the agreement by setting up the statute"). When landowner knows intent is to make permanent improvements on his land and orally grants a license, improvements made "on the faith of the license" raise an estoppel which converts it into an easement that satisfies part performance exception to the statute of frauds because revocation thereafter would be a fraud. See 2 TIFFANY, supra note 39, § 349. [↑](#footnote-ref-407)
407. 420 Rerick, 14 Serg. & Rawle at 270; cf. Pound, Consideration in Equity, supra note 32, at 440-41, 443 (claiming that courts often dwell on the presence of part performance to avert statute of frauds and seem to assume that therefore a consideration contract is present as well); cf. WILLISTON'S WALD'S POLLOCK, supra note 1, at 790-91 (stating that plaintiff's right on part performance exception to statute of frauds "rests not on contract but on a principle akin to estoppel"). [↑](#footnote-ref-408)
408. 421 Rerick, 14 Serg. & Rawle at 271. Plaintiff would have built a mill on a nearby stream if landowner had not granted license to permit mill to be built on licensor's more favorable site. Id. at 267-68. Parsons cited Rerick for the proposition that equity would find consideration in promissory reliance. 3 THEOPHILUS PARSONS, THE LAW OF CONTRACTS 359 n.(c) (Boston, Little, Brown & Co. 5th ed. 1866). [↑](#footnote-ref-409)
409. 422 51 A. 586 (Pa. 1902). [↑](#footnote-ref-410)
410. 423 Id. at 587. [↑](#footnote-ref-411)
411. 424 Id. at 586-87. [↑](#footnote-ref-412)
412. 425 Id. [↑](#footnote-ref-413)
413. 426 Harris, 51 A. at 587; accord Rerick, 14 Serg. & Rawle at 271 (opining that it would be "against all conscience to annul" such a grant after grantee's expenditures observed by grantor); cf. Pound, Consideration in Equity, supra note 32, at 443 (explaining equity would treat a license as an easement to prevent "unconscionable revocation"). [↑](#footnote-ref-414)
414. 427 Harris, 51 A. at 587 (quoting Rerick, 14 Serg. & Rawle at 271). [↑](#footnote-ref-415)
415. 428 9 F.2d 138 (E.D. Pa. 1925). [↑](#footnote-ref-416)
416. 429 Id. at 139. Plaintiff's cause of action was to restrain defendant from using plaintiff's trade name and trademark. Id. [↑](#footnote-ref-417)
417. 430 Id. [↑](#footnote-ref-418)
418. 431 Id. [↑](#footnote-ref-419)
419. 432 Id.; Rerick, 14 Serg. & Rawle at 271; Harris, 51 A. at 587. [↑](#footnote-ref-420)
420. 433 ALI COMMENTARIES 1926, supra note 19, at 15. [↑](#footnote-ref-421)
421. 435 Riley, 9 F.2d at 138; Erskine v. Chevrolet Motors Co., 117 S.E. 706, 710-11 (N.C. 1923); Harris, 51 A. at 587; accord Jack's Cookie Co. v. Brooks, 227 F.2d 935, 937-39 (4th Cir. 1955); J.C. Millett Co. v. Park & Tilford Distillers Corp., 123 F. Supp. 484, 493 (N.D. Cal. 1954). [↑](#footnote-ref-422)
422. 436 The origins of the requirement of certainty was associated with need to plead a sum certain in the action of debt in the fifteenth century. See SIMPSON, supra note 2, at 61-63. The dramatic shift in the economy generated the need to assure supply and demand in an uncertain industrial market, thus making long-term contracts essential. See Ian R. Macneil, Restatement (Second) of Contracts and Presentation, 60 VA. L. REV. 589, 594-98 (1974); Clyde W. Summers, Collective Agreements and the Law of Contracts, 78 YALE L.J. 525, 528-34 (1969). [↑](#footnote-ref-423)
423. 437 E.g., William Whitman & Co. v. Namquit Worsted Co., 206 F. 549, 554 (D.R.I. 1913) (postponing specification of exact sizes and styles of yarns); Marin Water & Power Co. v. Town of Saucalito, 143 P. 767, 772-73 (Cal. 1914) ("best endeavors"); Work v. Welsh, 43 N.E. 719, 721 (Ill. 1896) (leaving exact location of four acres on larger tract unspecified until later). [↑](#footnote-ref-424)
424. 438 Cf. Fuller & Perdue, supra note 127, at 376-77. [↑](#footnote-ref-425)
425. 439 El Dorado Ice & Planing Mill Co. v. Kinard, 131 S.W. 460, 461-62 (Ark. 1910) (saying certain and mutual as to that amount); see also Caddo ***Oil*** & Mining Co. v. Producers ***Oil*** Co., 64 So. 684, 686 (La. 1913) (holding that certainty and mutuality issues posed by elective right of driller to determine number of drillings was solved by the number of wells actually drilled); Erskine v. Chevrolet Motors Co., 117 S.E. 704, 714 (N.C. 1923) (stating issues overcome to extent of "reliance upon the representations and promises"). [↑](#footnote-ref-426)
426. 440 Marin Water & Power Co., 143 P. at 772 (involving contract to lay and maintain water pipe with due diligence). [↑](#footnote-ref-427)
427. 441 Id. at 773. [↑](#footnote-ref-428)
428. 442 New York introduced the notion of implied duty of good faith in contract performance. See Wigand v. Bachmann-Bechtel Brewing Co., 118 N.E. 618 (N.Y. 1918); Asahel Wheeler Co. v. Mendleson, 167 N.Y.S. 435 (N.Y. App. Div. 1917). Wigand drew inspiration from a 1905 decision which required fiduciary obligations of a railroad reorganization committee toward bondholders. Indus. & Gen. Trust v. Tod, 73 N.E. 7, 9-10 (N.Y. 1905). [↑](#footnote-ref-429)
429. 443 Work v. Welsh, 43 N.E. 719 (Ill. 1896); Ottumwa, Cedar Falls & St. Paul Ry. Co. v. McWilliams, 32 N.W. 315 (Iowa 1887); Curry v. Ky. W. Ry. Co., 78 S.W. 435 (Ky. 1904). [↑](#footnote-ref-430)
430. 444 Work, 43 N.E. at 721; Curry, 78 S.W. at 436. [↑](#footnote-ref-431)
431. 445 32 N.W. 315 (Iowa 1887). [↑](#footnote-ref-432)
432. 446 Id. at 316-17. [↑](#footnote-ref-433)
433. 447 Id. at 317. [↑](#footnote-ref-434)
434. 448 Id. at 316. [↑](#footnote-ref-435)
435. 449 Work, 43 N.E. at 721. [↑](#footnote-ref-436)
436. 450 Id. (stating that construction work was "acceptance" and that "consideration" had passed). [↑](#footnote-ref-437)
437. 451 Id. at 722 (concluding that remedy only needed to cover that part of land identified as certain by construction of factory building). [↑](#footnote-ref-438)
438. 452 78 S.W. 435, 436 (Ky. 1904). [↑](#footnote-ref-439)
439. 453 Curry, 78 S.W. at 436 (quoting SEYMOUR D. THOMPSON, 4 COMMENTARIES ON THE LAW OF PRIVATE CORPORATIONS § 5279 (no edition or date provided in opinion)). The Kentucky court emphasized underlying policy that did not support removal of the fully-installed tracks available for "public use." Id. [↑](#footnote-ref-440)
440. 454 See Paradine v. Jane, 82 Eng. Rep. 897 (K.B. 1647) (ruling that defendant had to pay land rent even though he had been ousted from the land by an invader during English civil war). [↑](#footnote-ref-441)
441. 455 Louisville & Nashville R.R. v. Coyle, 97 S.W. 772 (Ky. 1906) [↑](#footnote-ref-442)
442. 456 Id. [↑](#footnote-ref-443)
443. 457 Id. at 773 (Ky. 1906) ("The letters which were uncertain were made definite by the conduct of the parties in construing them and performing them."). [↑](#footnote-ref-444)
444. 458 Id. at 773-74 (holding that measure of damages for ties not yet manufactured was difference between contract and market price). In appropriate cases, specific performance could be available. Id. at 774. [↑](#footnote-ref-445)
445. 459 131 S.W. 460 (Ark. 1910). [↑](#footnote-ref-446)
446. 460 Id. at 461. [↑](#footnote-ref-447)
447. 461 Id. [↑](#footnote-ref-448)
448. 462 Id. (noting that defendant also argued lack of mutuality since plaintiff not bound to secure any lumber). [↑](#footnote-ref-449)
449. 463 Id. at 462. In an 1879 New York case, an agreement to deliver the same quality of lumber as delivered the previous winter, without an indication of quantity, was binding only to extent of lumber actually delivered. Quick v. Wheeler, 78 N.Y. 300, 303-05 (1879). [↑](#footnote-ref-450)
450. 464 El Dorado Ice & Planing Mill Co., 131 S.W. at 461. [↑](#footnote-ref-451)
451. 465 Id. at 462. [↑](#footnote-ref-452)
452. 466 See Wigand v. Bachmann-Bechtel Brewing Co., 118 N.E. 618, 619-20 (N.Y. 1918) (ordering expectation damages). The plaintiff-buyer in this type of output contract situation could recover since he relied. Id. [↑](#footnote-ref-453)
453. 467 U.C.C. § § 1-203, 2-306 (1952). [↑](#footnote-ref-454)
454. 468 Parks v. Griffith, 91 A. 581, 584 (Md. 1914); cf. Bailey v. Austrian, 19 Minn. 535 (1873) (stating that promise to supply all pig-iron buyer might "want" lacked mutuality because no obligation on buyer to actually want only pig-iron). [↑](#footnote-ref-455)
455. 469 Parks, 91 A. at 584. [↑](#footnote-ref-456)
456. 470 Id. at 585 (saying there was a lack of mutuality and consideration if based on what buyer might "want" but that a quantity determined by amount "required" was "ascertainable . . . with reasonable certainty") (citing Wheeling Steel & Iron Co. v. Evans, 97 Md. 305 (1903)). The court cited Wells v. Alexandre in support of point that amount "needed" or "required" was sufficient. Id.; Wells v. Alexandre, 130 N.Y. 642, 644-45 (1891) (interpreting contract to base quantity on the actual business requirements of buyer). [↑](#footnote-ref-457)
457. 471 See Asahel Wheeler Co. v. Mendelson, 167 N.Y.S. 435, 436-37 (1917); U.C.C. § § 1-203, 2-306 (1952). When a buyer ordered goods in a requirement contract far in excess of his needs after market price had more than doubled, the court found buyer acted outside parties' contemplation by taking undue advantage in absence of real business need. Mendleson, 167 N.Y.S. at 437; cf. Wells, 130 N.Y.S. at 645 (emphasizing that rule of reason must apply when seller entirely at mercy of buyer). [↑](#footnote-ref-458)
458. 472 See Fontaine v. Baxley, 17 S.E. 1015, 1018 (Ga. 1892) (holding that measure of buyer's damages was quantity buyer would have needed in transactions over the year stated); see also 1 CORBIN, supra note 126, § 156, at 509 (saying to "require" is the equivalent of to "need"). [↑](#footnote-ref-459)
459. 473 See, e.g., Bailey v. Austrian, 19 Minn. 535 (1873). [↑](#footnote-ref-460)
460. 474 See, e.g., Work v. Welsh, 43 N.E. 719, 721 (Ill. 1896); Curry v. Ky. W. Ry. Co., 78 S.W. 435, 436 (Ky. 1904). [↑](#footnote-ref-461)
461. 475 See, e.g., Wigand v. Bachmann-Bechtel Brewing Co., 118 N.E. 618 (N.Y. 1918); Asahel Wheeler Co. v. Mendleson, 167 N.Y.S. 435 (N.Y. App. Div. 1917). [↑](#footnote-ref-462)
462. 476 Pinnel's Case, 77 Eng. Rep. 237 (C.P. 1602) (refusing attempted reduction of payment due because modification to pay ten pounds was no satisfaction for the twenty pounds); Stilk v. Myrick, 170 Eng. Rep. 1168 (K.B. 1809) (refusing attempted increase in compensation because employees had not taken on any new duties). [↑](#footnote-ref-463)
463. 477 See, e.g., Moore v. Williamson, 104 So. 645, 646-47 (Ala. 1925); Rye v. Phillips, 282 N.W. 459, 460 (Minn. 1938); Clayton v. Clark, 21 So. 565, 567-68 (Miss. 1896); Frye v. Hubbell, 68 A. 325, 334 (N.H. 1907); U.C.C. § 2-209(1) (1952). [↑](#footnote-ref-464)
464. 478 Pinnel's Case, 77 Eng. Rep. 237 (C.P. 1602) (refusing debt action since part payment did not discharge obligation); cf. Richards v. Bartlet, 74 Eng. Rep. 17 (K.B. 1584) (ruling in assumpsit action that no new profit to plaintiff nor charge to defendant by modification). Foakes v. Beer later presumed that Pinnel's Case also barred attempted increases in contract obligations and thereby pointed to Pinnel's Case as the source of the preexisting duty rule for both decreases and increases in contract obligations. Foakes v. Beer, 9 App. Cas. 605, 609, 615 (H.L. 1884); see DAWSON, GIFTS, supra note 231, at 210 (stating that Pinnel's accord rule spread to increases in obligations as well). [↑](#footnote-ref-465)
465. 479 Foakes v. Beer, 9 App. Cas. 605, 622 (H.L. 1884); cf. Benjamin F. Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 U. PA. L. REV. 459, 487-88 (1950) (arguing it would not be unjust to demand the original rental price from a tenant who is allowed to pay less than original agreement). But cf. Jaffray v. Greenbaum, 20 N.W. 775, 778-79 (Iowa 1884) (finding consideration in benefit to landlord in keeping tenant afloat to make reduced rental payments). [↑](#footnote-ref-466)
466. 480 The law lords indiscriminately lumped together precedents involving increases in contract obligations under the Stilk v. Myrick strand and decreases in contract obligations under Pinnel's Case. [↑](#footnote-ref-467)
467. 481 It is easier to make the case for justifiable reliance binding a promise to reduce the rent because of its defensive nature in barring creditors from demanding full amount; however, reliance on a modification to increase an obligation creates a new cause of action for the added amount. Cf. FIFOOT, supra note 2, at 414 (asserting that consideration needed on the offense to support assumpsit on a new obligation but not defensively to discharge an obligation); DAWSON, GIFTS, supra note 231, at 207-09 (asserting that consideration concerns formation of contract but it had become confused with discharge). [↑](#footnote-ref-468)
468. 482 Wadsworth v. Thompson, 8 Ill. 423, 431 (1846). Modern formalist English common law contract permits promissory estoppel to apply as a defensive tool to enforce reduction of a contractual obligation under the High Trees decision. See FURMSTON, supra note 328, at 107-16 (setting out the narrow range of English promissory estoppel as a reform of the preexisting duty rule); cf. PATRICK ATIYAH & ROBERT SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW 88-89, 116, 128-32, 222-23, 243-44 (1987) (discussing modern English judges' formalist tendencies in contrast to the natural law outlook of the American judiciary). Justifiable reliance has not been permitted, however, to create a new cause of action, with the exception in property law of the limited reach of proprietary estoppel. See Cent. London Prop. Trust Ltd. v. High Trees House Ltd., 1 K.B. 130 (1947); Crabb v. Arun Dist. Council, Ch. 179, 187-88, 195 (1976) (concerning proprietary estoppel to avert a fraud in equity); cf. Hughes v. Metro. Ry., 2 App. Cal. 439, 449 (1877) (emphasizing temporary suspension of waiver of performance that defendant was "induced" to do). [↑](#footnote-ref-469)
469. 483 See, e.g., Nicoll v. Burke, 78 N.Y. 580, 585 (1879); McKenzie v. Harrison, 24 N.E. 458, 459-60 (N.Y. 1890). The reliance of creditors was a basis for enforcing assignments for the benefit of creditors and of creditors' compositions. See Taylor v. Ewing, 132 P. 1009 (Wash. 1913) (binding debtor to agreement to assign on account of reliance of thirty-eight of forty creditors); Butler v. Rhodes, 170 Eng. Rep. 341 (K.B. 1794) (barring one creditor from withdrawing from composition after other creditors committed); Bartlett v. Woodsworth Mason Co., 41 A. 264 (N.H. 1898) (concerning creditors' composition). [↑](#footnote-ref-470)
470. 484 Nicoll, 78 N.Y. at 585. Since the parties fully performed the modified agreement as well, it would have been useful to point out that the proprietary logic in the debt action Pinnel's Case was inappropriate to the promise-based action of assumpsit. See JAMES BARR AMES, LECTURES ON LEGAL HISTORY 329-30 (1913); cf. STOLJAR, supra note 2, at 120-21. [↑](#footnote-ref-471)
471. 485 McKenzie, 24 N.E. at 460 (making the remarkable claim that executed gift had been made, thereby taking it out of contract rule stated by Coke in Pinnel's Case and the law lords in Foakes v. Beer). This executed gift logic exhibited a reticence to make a frontal reliance-based assault against the recently-announced decision in Foakes v. Beer; nonetheless, it entailed disguised reliance hardship relief in the absence of clear donative intent. By contrast, the explanation of the court in Nicoll v. Burke was doctrinally closer to the mark in reasoning that the rent reduction agreement was binding because "defendant occupied the premises and the plaintiffs received the rent, according to the altered terms of the contract." Nicoll, 78 N.Y. at 585. [↑](#footnote-ref-472)
472. 486 Today, a modification may be binding, in the absence of reliance, if made "in view of circumstances not anticipated by the parties when the contract was made." RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981). [↑](#footnote-ref-473)
473. 487 67 N.W. 1026 (Minn. 1896) (involving dispute between landlord and other creditors of insolvent lessee). [↑](#footnote-ref-474)
474. 488 Id. [↑](#footnote-ref-475)
475. 489 Id. [↑](#footnote-ref-476)
476. 490 Id. at 1027. [↑](#footnote-ref-477)
477. 491 Id. (stating that modification was binding "especially as it has been executed"). This case is similar to modern English decision High Trees. See Cent. London Prop. Trust Ltd. v. High Trees House Ltd., 1 K.B. 130 (1947). [↑](#footnote-ref-478)
478. 492 Ten Eyck, 67 N.W. at 1027-28. An added prong of the rationale was grounded upon the benefit that lessee's reliance provided to lessor in form of continuing occupancy and some flow of rental income. Id. (citing Jaffray v. Greenbaum, 20 N.W. 775 (Iowa 1884) and Raymond v. Krauskopf, 54 N.W. 432 (Iowa 1893)). [↑](#footnote-ref-479)
479. 493 See, e.g., Raymond v. Krauskopf, 54 N.W. 432, 433 (Iowa 1893) (noting that severe storm's damage to crops prompted agreement to halve the crops that farmer was required to deliver to landlord). [↑](#footnote-ref-480)
480. 494 170 Eng. Rep. 1168 (K.B. 1809). [↑](#footnote-ref-481)
481. 495 Id. at 1169. [↑](#footnote-ref-482)
482. 496 Id. (saying seamen's original duty was to work short-handed if desertions); cf. Harris v. Watson, 170 Eng. Rep. 94, 94 (K.B. 1791) (refusing seaman extra wages promised under coercion while ship was in danger on policy grounds). [↑](#footnote-ref-483)
483. 497 26 Mass. 298 (9 Pick.) (1830). [↑](#footnote-ref-484)
484. 498 Id. at 299-300. [↑](#footnote-ref-485)
485. 499 Id. at 303 (citing Lattimore v. Harsen, 14 Johns. 330 (N.Y. Sup. Ct. 1817)), 304 (citing Le Fevre v. Le Fevre, 4 Serg. & Rawle 241 (Pa. 1818)). [↑](#footnote-ref-486)
486. 501 Id. [↑](#footnote-ref-487)
487. 502 Id. at 331 (ruling consideration supported second contract); Munroe v. Perkins, 26 Mass. (9 Pick.) 298, 303-04 (1830) (finding a waiver of original contract); cf. Harris v. Carter, 118 Eng. Rep. 1251, 1252 (Q.B. 1854) (stating dictum that if first contract had been discharged and a new contract had been made to pay higher wages to seamen because of desertions, then consideration would have been present). The Holmesian paradox of a right to breach a contract and pay damages, derived from Lattimore v. Harsen, was roundly criticized by other commentators who saw an obligation in law to perform a contract and only secondarily to pay damages upon breach. See Holmes, Path, supra note 62, at 462 ("The duty to keep a contract at common law means a prediction that you must pay damages if you do not keep it -- and nothing else."); but cf. Willard T. Barbour, The "Right" to Break a Contract, 16 MICH. L. REV. 106, 107-09 (1917) (stressing that duty to perform since time of Bracton); 1 HOLMES-POLLOCK LETTERS, supra note 72, at 80 (chiding by Pollock of Holmes for his right-to-breach view on grounds of morality and promisee's reasonable expectations); 1A CORBIN, supra note 126, § 182 (depicting primary duty to perform contract). [↑](#footnote-ref-488)
488. 503 4 Serg. & Rawle 241 (Pa. 1818) (holding action was trespass vi et armis for defendant cutting the water pipe). [↑](#footnote-ref-489)
489. 504 Id. at 241-42. [↑](#footnote-ref-490)
490. 505 Le Fevre, 4 Serg. & Rawle at 244 (concluding that plaintiff had partly performed "by payment of money, taking possession and making valuable improvements, the conscience of the other is bound to carry it into execution"). [↑](#footnote-ref-491)
491. 506 See, e.g., Rerick v. ***Kern***, 14 Serg. & Rawle 267, 271-72 (Pa. 1826) (concerning land license); Wynn v. Garland, 19 Ark. 23, 34-36 (1857) (concerning land license); Butcher v. Stapely, 23 Eng. Rep. 524, 525 (Ch. 1685) (land sale); see also Bright v. Bright, 41 Ill. 97 (1866) (stating that taking possession of land was not enough to take it outside statute of frauds but improvements made it a "promise resting upon a valuable consideration"). In Le Fevre v. Le Fevre, plaintiff's lawyer and the court paraphrased Phillipps' comment that evidence of oral modification may be admitted to vary a written agreement "provided those variations have been acted upon." Le Fevre, 4 Serg. & Rawle at 242, 245 (citing SAMUEL M. PHILLIPPS, A TREATISE ON THE LAW OF EVIDENCE 450 (n.p. 2d ed. 1815)). [↑](#footnote-ref-492)
492. 507 Giving reliance relief to avert fraud was consistent with sixteenth century actions permitted at common law in assumpsit for deceit and in church courts under fidei laesio. [↑](#footnote-ref-493)
493. 508 Munroe v. Perkins, 26 Mass. (9 Pick.) 298, 305 (1830). The court emphasized that promisee was induced to return to work and in fact completed performance. Id. at 303, 305. [↑](#footnote-ref-494)
494. 509 Lattimore v. Harsen, 14 Johns. 330, 331 (N.Y. 1817). [↑](#footnote-ref-495)
495. 510 Le Fevre, 4 Serg. & Rawle 241, 244-45. [↑](#footnote-ref-496)
496. 511 The concern about coercion embedded in the preexisting duty rule was assuaged in Munroe by the contractor's election to breach without any demand for higher compensation, followed by the owner's voluntary offer to pay more and the contractor's subsequent reliance upon the promise to pay more. Munroe, 26 Mass. (9 Pick.) at 299-300. [↑](#footnote-ref-497)
497. 512 In Coyner v. Lynde, 10 Ind. 213 (1858), a railway agreed to pay more to induce contractor to return to a losing contract. Id. at 214-15. The court cited Munroe and Lattimore and emphasized that the defendant "relying on this promise . . . completed said work." Id. Coyner was widely cited during the remainder of the century. In Meech v. City of Buffalo, defendant's counsel cited Lattimore and Munroe, and the court paraphrased the latter, without citation, in emphasizing the relevance of the reliance. Meech v. City of Buffalo, 29 N.Y. 198, 211, 213-14 (1864). By the Meech court's reading of Munroe conflating the reliance element in Le Fevre together with the elective right-to-breach in Lattimore, the New York court effectively compromised Lattimore's controversial theory. Cf. FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 202 n. (n.p. 3d ed. 1881) (observing that Munroe also rejected that elective right-to-breach in Lattimore could stand alone). [↑](#footnote-ref-498)
498. 513 See, e.g., Sargent v. Robertson, 46 N.E. 925, 928 (Ind. Ct. App. 1897) (saying "much stress is properly laid upon . . . subsequent conduct of the parties. It would seem that it would be a reproach to the law if any of its rules were so inflexible" as to strictly apply preexisting duty rule here); Evans v. Or. & Wash. R.R., 108 P. 1095, 1096 (Wash. 1910) (stating that enforcement supported freedom of contractors to modify their relationship). Restaters would recognize this reliance basis for a binding contract modification. See RESTATEMENT (SECOND) OF CONTRACTS § 89(c) (1981). [↑](#footnote-ref-499)
499. 514 See, e.g., Bryant v. Lord, 19 Minn. 396, 404 (1872); Rogers v. Rogers, 1 N.E. 122 (Mass. 1885). [↑](#footnote-ref-500)
500. 515 E.g., Bryant v. Lord, 19 Minn. 396, 404 (1872) (stating if defendant refused to proceed unless a modification was granted, then the substituted agreement would be on valid consideration); Rogers v. Rogers, 1 N.E. 122, 122 (Mass. 1885) ("The parties could clearly substitute for it a new contract, which should determine their rights and liabilities after the new contract was made, and this would operate as a waiver or discharge of the first contract. . . ."); Schwartzreich v. Bauman-Basch, 131 N.E. 887, 888-90 (N.Y. 1921) (citing Lattimore that rescission and substitution is good, and mutual promises are consideration). [↑](#footnote-ref-501)
501. 516 See KEVIN M. TEEVEN, PROMISES ON PRIOR OBLIGATIONS AT COMMON LAW 30-35, 43-46, 69 (1998). Modern policing mechanisms provided more selective protection against overreaching than the absolutist bar of the preexisting duty rule. [↑](#footnote-ref-502)
502. 517 63 N.W. 1105 (Minn. 1895). [↑](#footnote-ref-503)
503. 518 Id. at 1106 (Minn. 1895) (seeing coercion in taking "unjustifiable advantage of the necessities of the other party"). The court said the breachor of the first contract "cannot lay the foundation of an estoppel by his own wrong." Id. at 1107. See also RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981) (rejecting fiction of rescission and substitution because modified contract might be "unfair and inequitable"). [↑](#footnote-ref-504)
504. 519 E.g., Rogers v. Rogers, 1 N.E. 122, 122 (Mass. 1885); Bryant v. Lord, 19 Minn. 396, 404 (1872). [↑](#footnote-ref-505)
505. 520 Pollock opposed Holmes' callous views that justifiable reliance could not be a ground for consideration and that a contractor had an elective right to breach and pay contract damages. See HOLMES, supra note 8, at 294-96; Holmes, Path, supra note 51, at 462; cf. 1 HOLMES-POLLOCK LETTERS, supra note 72, at 80; FREDERICK POLLOCK, PRINCIPLES OF CONTRACT 1 (8th ed. 1911); see also Willard Barbour, The "Right" to Break a Contract, 16 MICH. L. REV. 106, 107-09 (1917); 1A CORBIN, supra note 126, § 182. [↑](#footnote-ref-506)
506. 521 King, 63 N.W. at 1106-07; accord RESTATEMENT (SECOND) OF CONTRACTS § 89(a) (1981). [↑](#footnote-ref-507)
507. 522 The fact that a contract turned out to be a losing deal for one of the parties did not of itself mean there were unanticipated circumstances to justify a modification. See King, 63 N.W. at 1107. [↑](#footnote-ref-508)
508. 523 29 N.Y. 198 (1864). [↑](#footnote-ref-509)
509. 524 Meech, 29 N.Y. at 198; cf. Osborne v. O'Reilly, 9 A. 209, 216 (N.J. 1887) (holding modification binding on account of reliance and changed circumstances). [↑](#footnote-ref-510)
510. 525 Meech, 29 N.Y. at 218. [↑](#footnote-ref-511)
511. 526 Id. at 213-14 (telling assessed property owners who brought action that it was "eminently just" for city to promise to pay more). [↑](#footnote-ref-512)
512. 527 Id. at 213. [↑](#footnote-ref-513)
513. 528 63 N.W. 479 (Minn. 1895). [↑](#footnote-ref-514)
514. 529 Michaud, 63 N.W. at 480-81 (commenting that added costs to remove rocks in reliance on modification "equitably estops him from insisting on" the original terms). [↑](#footnote-ref-515)
515. 530 Id. at 479. [↑](#footnote-ref-516)
516. 531 Id. at 480; see Munroe v. Perkins, 26 Mass. (9 Pick.) 298, 305 (1830); cf. Creamery Package Mfg. Co. v. Russell, 78 A. 718, 719 (Vt. 1911) (ruling that a modification was binding when changed circumstances caused modification which was relied upon). [↑](#footnote-ref-517)
517. 532 Accord Osborne v. O'Reilly, 9 A. 209, 216 (N.J. 1887) (enforcing modification because of changed circumstances and reliance). [↑](#footnote-ref-518)
518. 533 King v. Duluth, M. & N. Ry. Co., 63 N.W. 1105, 1107 (Minn. 1895). A generation earlier Bishop v. Busse enforced a modification because of unexpected increases in materials in rebuilding a house damaged by the Great Chicago Fire of 1871. Bishop v. Busse, 69 Ill. 403, 407 (1873). See also Linz v. Schuck, 67 A. 286, 289 (Md. 1907) (holding modification binding because "the difficulties were substantial, unforeseen, and not within the contemplation of the parties when the original contract was made"). [↑](#footnote-ref-519)
519. 534 King, 63 N.W. at 1107. Qualifying changed circumstances are occasionally brought on by some fault of the defendant. See id. at 1108 (concerning railway changing location of railway line and railway's defaults); Osborne, 9 A. at 215 (concerning excavator "misled" by owner's representations regarding nature of stone); United Steel Co. v. Casey, 262 F. 889, 893 (6th Cir. 1920) (concerning delays and hindrances of steel company). [↑](#footnote-ref-520)
520. 535 Of course when there were changed circumstances, an additional performance burden would be present. The exchange of extra work done in reliance on the promise of additional payment was supported by consideration. See King, 63 N.W. at 1107. [↑](#footnote-ref-521)
521. 536 Id. (tolerating the waiver and substitution reasoning for changed circumstances). [↑](#footnote-ref-522)
522. 537 E.g., Rogers v. Rogers, 1 N.E. 122, 122 (Mass. 1885); Bryant v. Lord, 19 Minn. 396, 404 (1872). See RESTATEMENT (SECOND) OF CONTRACTS § 279 cmt. c (1981) (holding substituted contract binding if supported by consideration). [↑](#footnote-ref-523)
523. 538 See RESTATEMENT (SECOND) OF CONTRACTS § 89 cmt. b (1981) (rejecting fiction of rescission and substitution). [↑](#footnote-ref-524)
524. 539 See RESTATEMENT (SECOND) OF CONTRACTS § 89(a), (b) (1981). [↑](#footnote-ref-525)
525. 540 [↑](#footnote-ref-526)