In Defense of Mutuality of Obligation: Why "Both Should Be Bound, or Neither"

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I. INTRODUCTION

WANTED!
Contract Law’s Mutuality of Obligation Doctrine!
Dead or Alive!

But preferably dead, say most legal scholars. Herman Oliphant or-
dered its execution in 1928.¹ His judgment has now been affirmed by
the American Law Institute, and commentators including Corbin, Oli-

¹. See Herman Oliphant, Mutuality of Obligation in Bilateral Contracts at Law (pts. 1 & 2), 25 COLUM. L. REV. 705 (1925), 28 COLUM. L. REV. 997 (1928). Oliphant’s influential article argued that mutuality of obligation’s maxim “both should be bound, or neither” had no use in contemporary case law and was not required by logic or other doctrine. He allowed that the illusory promise doctrine had some potential use, however. See Oliphant, supra, 28 COLUM. L. REV. at 1006.
phant, Patterson, Williston, Barnett, Eisenberg, Farber & Matheson, Gordon, Wessman, Perillo & Bender, Calamari & Perillo, Murray and others. A few courts have begun to play the executioner by overruling the doctrine. Accordingly, I was going to write a short piece called The Death of Mutuality of Obligation. Death of titles are in vogue. I was once an apprentice mortician and have always wanted to use the metaphor. But before I began embalming mutuality of obligation, I held a mirror


4. Death of titles abound. Memorable examples include The Death of Contract (Gilmore, of course), The Death of Reliance (Barnett), The Death of the Irreparable Injury Rule (Laycock), The Death of Copyright (Minnasin), The Death of Discourse (Collins & Skover), The Death of an Honorable Profession (Bogus), The Death of Law? (Fiss—who much hyperbole here for me), The Death of Liability (Lopucki: kudos for this title—just the right hyperbole—how could Yale L.J. resist?), The Death of Common Sense (Howard), The Death of the Up-Down Distinction (Shapiro), The Death of an Author, By Himself (Tushnet), Death of a Salesman (Miller), The Death of Ivan Ilych (Tolstoy). Some titles are less memorable: The Death of Solid Waste Flow Control (Young).

5. It was a dead end job. I have now moved to graver matters. Cf. note 4. Now, my students complain that I have a stiff delivery. I'm glad they get everything out on the table. I'll try to bury my past.
under the corpse's nose. Water condensed on the glass! The cold body had yet breath left! How could mutuality of obligation remain vital?

The mutuality of obligation doctrine is generally stated as "both parties must be bound to a contract, or neither is." The doctrine supposedly requires that each party to a contract have at the time of contract formation some executory, legally enforceable obligation. Of course, this doctrine does not apply to unilateral contracts, in which parties trade a promise for a performance, i.e., if you mow my lawn I'll pay you $15.7 If the contract is unilateral, the contract forms when the performance of one party is complete, when the lawn is mowed. The party who has already performed lacks any further obligation at the time of formation. That lack does not prevent the promising party from being bound, however: the $15 must then be paid. The mutuality of obligation doctrine applies not to such unilateral contracts but only to bilateral contracts—contracts in which parties trade promises.

Courts have held a promise traded for another promise to be enforceable for well over 400 years, since the early to mid-1500s.8

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6. See, e.g., Lopez v. Plaza Fin. Co., No. 95-C-7567, 1996 WL 210073, at *4 (N.D. Ill. Apr. 25, 1996) ("Under Illinois law, mutuality of obligation requires that either both parties be bound, or neither be bound."); Economy Roofing & Insulating Co. v. Zumaris, 538 N.W.2d 641, 650 (Iowa 1995) ("Mutuality of obligation requires that unless both parties to an agreement are bound, neither is bound."); Reed v. Citizens Ins. Co. of Am., 499 N.W.2d 22, 25 (Mich. Ct. App. 1993) ("Mutuality of obligation' means that both parties to an agreement are bound or neither is bound, that is, mutuality is not present where one party is bound to perform, but not the other."); Serpa v. Darling, 810 P.2d 778, 781 (Nev. 1991) ("Mutuality of obligation requires that unless both parties to a contract are bound, neither is bound." (internal quotations omitted)).

7. Some have claimed that mutuality of obligation applies to unilateral contracts. For example, the Restatement (Second) of Contracts § 79 (1981) treats mutuality's non-applicability to unilateral contracts as an argument for abandoning the mutuality doctrine: "Both must be bound or neither is bound." "That statement is obviously erroneous as applied to an exchange of promise for performance." Id. cmt. f. The Restatement (Second) in this instance argues against a straw man. Mutuality of obligation was never properly intended to apply to unilateral contracts (as I demonstrate in Part II of this paper).

Courts currently say that a mutual (or reciprocal, or bargained-for) promise constitutes consideration for a promise, causing it to be enforceable. I call this the mutual promise rule. The mutuality of obligation doctrine—that both should be bound, or neither—augments the mutual promise rule. The mutuality of obligation doctrine requires that both mutual promises legally bind their promisors. Commentators before now have viewed the mutuality of obligation requirement as a negative, and strong requirement—if one promise is not enforceable for any reason, the other must not be. This negative, strong form of the mutuality of obligation doctrine is often stated as a corollary to the mutual promise rule: a promise not legally binding is not consideration.

It is this negative, strong form of the mutuality of obligation doctrine that commentators have condemned. They have spoken of it as if none other form existed. Assuming that mutuality of obligation meant only this negative, strong form doctrine, nearly every commentator since Oliphant has called for its overruling.

The mutuality of obligation doctrine is often stated as a corollary to the mutual promise rule: a promise not legally binding is not consideration.

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10. See ISS Int'l Serv. Sys., Inc. v. Alabama Motor Express, Inc., 686 So. 2d 1184, 1189 (Ala. Civ. App. 1996) ("These agreements must be mutually binding . . . ."); Centerville Builders, Inc. v. Wynne, 683 A.2d 1340, 1341 (R.I. 1996) ("This mutuality is achieved when both parties are 'legally bound through the making of reciprocal promises.'" (quoting Crellin Techs., Inc. v. Equipmentlease Corp., 18 F.3d 1, 7-8 (1st Cir. 1994)). This rule is commonly stated by use of the more general phrase, "either both must be bound, or neither is bound." Hoadley v. Hoadley, 155 N.E. 728, 730 (N.Y. 1926) (quoting Blackstone); see also cases cited supra note 6.

11. See, e.g., Perillo & Bender, supra note 2, § 6.1; Williston, supra note 9, § 7.13.

12. See, e.g., Restatement (Second) of Contracts § 79 cmt. f (1981) (purporting to do away with the mutuality of obligation doctrine); Henry Winthrop Ballentine, Mutuality and Consideration, 28 Harv. L. Rev. 121 (1914); Arthur L. Corbin, Non-Binding Promises as Consideration, 26 Colum. L. Rev. 550 (1926); Oliphant, supra note 1; Samuel Williston, supra note 9, at 857; authorities cited supra note 2.

13. See, e.g., Oliphant, supra note 1, 28 Colum. L. Rev. at 1012 ("[N]o logic is able to connect the supposed mutuality rule with any formulation of the doctrine of consideration and no other logical justification for it has ever been suggested.").
obligation be abandoned.\textsuperscript{14} And a few courts have now overruled mutuality of obligation on the ground that the doctrine is a forbidden inquiry into adequacy or value of consideration, because even a non-binding promise has sufficient value to serve as consideration.\textsuperscript{15}

This paper defends the doctrine of mutuality of obligation. First, this paper sets straight the history of mutuality of obligation. Williston taught that mutuality of obligation was created in \textit{Harrison v. Cage},\textsuperscript{16} (1698), implying that the mutual promise rule had functioned for well over 100 years without the mutuality corollary. Williston was wrong. The mutuality of obligation principle has been integral to the mutual promise rule since the mutual promise rule was created over 400 years ago. Only 400 year-old case law can prove this thesis, however. Accordingly, Part I discusses case reports which first discuss the mutual promise rule. Part II.A discusses how those same cases also establish the mutuality of obligation doctrine.

Second, this paper contends that the negative, strong form of the mutuality of obligation doctrine is incorrect and has never been the law. Parts II.A and II.B show that the meaning of the mutuality of obligation doctrine in the 1500s and thereafter was uncertain. Some judges obviously held to the negative, strong form understanding of it, and some did not. But 400 years of litigation has (i) revealed that the doctrine (a) does not function negatively and (b) is not a hard and fast requirement, and (ii) clarified the doctrine's proper role. Properly understood, the mutuality of obligation doctrine is not a negative but an affirmative principle: it says that if one party has a remedy then the other should, too. Moreover, the doctrine is only presumptive—mutual promises must presumptively bind equally. But the presumption is weak, and a variety of showings will overcome it.

\textsuperscript{14} \textit{See Restatement (Second) of Contracts} § 79 (1981) ("If the requirement of consideration is met, there is no additional requirement of 'mutuality of obligation.'"); \textit{id. cmt. f} ("The only requirement of 'mutuality of obligation' even in cases of mutual promises is that stated in §§ 76-77 [dealing only with illusory promises]."). Some courts have inferred that the \textit{Restatement (Second)} rejects the mutuality of obligation doctrine. \textit{See, e.g.}, Doctor's Assoc., Inc. v. Distajo, 66 F.3d 438, 451 (2d Cir. 1995); Design Benefit Plans, Inc. v. Enright, 940 F. Supp. 200, 205 (N.D. Ill. 1996); Lackey v. Green Tree Fin. Corp., 498 S.E.2d 898, 905 (S.C. Ct. App. 1998).


\textsuperscript{16} 5 Mod. 411, 87 Eng. Rep. 736 (1698). \textit{See infra} note 104 and text accompanying notes 136-41 for discussions of \textit{Harrison}. Others have thought the doctrine a tenet of classical contract law.

\textsuperscript{17} \textit{See Samuel Williston}, \textit{The Effect of One Void Promise in a Bilateral Agreement}, 25 Colum. L. Rev. 857, 859 (1925) ("The question was first raised in 1698 in \textit{Harrison v. Cage}.").
Third, Part II.C shows that, when the mutuality of obligation doctrine is understood as an affirmative presumption only, objections to it disappear and vital roles for the doctrine appear. In particular, the doctrine ensures that the law treats litigating parties equally. The doctrine also serves as the connecting link between mutual promises and the notions of contract and mutual agreement. In the end, as long as the law retains the mutual promise rule, the law of contracts in order to be coherent and fair in its application must retain the affirmative, presumptive mutuality of obligation doctrine as a corollary.

Part III addresses the relationship between mutuality of obligation and value. It shows that the mutuality of obligation doctrine is at root wholly unrelated to value, contrary to the assertions of both recent case law and the Restatement (Second) of Contracts.

This paper does not address three somewhat related concerns. First, it does not discuss whether the law should retain the mutual promise rule or the requirement of a consideration. I wish only to explicate the relationship between the mutual promise rule and the mutuality of obligation doctrine.

Second, the paper does not discuss the illusory promise rule. Some contract law scholars would have lawyers refrain from calling an illusory promise a mutuality defect,18 but courts and others often do so.19 The illusory promise rule requires that each party to a bilateral contract actually promise to do or not do something. Some things commonly called promises do not qualify. For instance, a promise may be so vague that no one is sure what is promised20; a promise may be conditioned on the promisor's whim (i.e., "I promise to perform if I want to.");21 a promisor may reserve a right to cancel any time, for any or no reason, and without notice, in which case nothing really is promised22; or sometimes what looks like a promise is only a statement of

18. Professor Farnsworth uses "mutuality of obligation" only to refer to a defect of assent, not to illusory promises. See E. Allan Farnsworth, Farnsworth on Contracts §§ 2.13, 3.2 (2d ed. 1998).
19. See, e.g., cases cited infra notes 20-22; Calamari & Perillo, supra note 9, at 228.
21. See, e.g., Johnson Enter. of Jacksonville, Inc. v. FPL Group, Inc., 162 F.3d 1290, 1311-12 (11th Cir. 1998); Ehre v. New York (In re Adirondack Ry. Corp.), 95 B.R. 897, 974 (N.D.N.Y. 1988) ("[T]he State's return promise imposes no obligation on itself since it amounts to an 'I will if I want to', rendering the settlement, as a matter of law, anything but binding ... . It is a promise in form but not in substance."); Rosenberg v. Lawrence, 541 So. 2d 1204, 1205 (Fla. Dist. Ct. App. 1988); Wickham & Burton Coal Co. v. Farmers' Lumber Co., 179 N.W. 417, 418 (Iowa 1920).
22. See, e.g., Miami Coca-Cola Bottling Co. v. Orange Crush Co., 296 F. 693, 694 (5th Cir. 1924); Jacob Schmidt Brewing Co. v. Minot Beverage Co., 93 F. Supp. 994,
intention to perform. Courts have said that these kinds of promises and others like them are illusory—not promises to do or not do anything. Courts have found certain other potentially illusory promises not to be illusory because bolstered by implied promises or obligations of good faith: promises conditioned on the promisor's satisfaction, promises to make best efforts, promises to buy requirements or sell output, and promises to serve as an exclusive dealer. But if the court can not or elects not to imply a promise and the alleged recipro-

999 (D.N.D. 1950); Pick Kwik Food Stores, Inc. v. Tenser, 407 So. 2d 216, 218 (Fla. Dist. Ct. App. 1981) ("If one party has the unrestricted right to terminate the contract at any time, that party makes no promise at all and there is not sufficient consideration for the promise of the other."); Allington Towers N., Inc. v. Rubin, 400 So. 2d 86, 88 (Fla. Dist. Ct. App. 1981). Employment at will allows both the employer and employee a right to cancel at any time, without restriction. Promises of employment at will are therefore considered to be illusory. See, e.g., Grouse v. Group Health Plan, Inc., 306 N.W.2d 114, 116 (Minn. 1981) ("On these facts no contract exists because due to the bilateral power of termination neither party is committed to performance and the promises are, therefore, illusory.").


24. RESTATEMENT (SECOND) OF CONTRACTS § 77 (1981) records that "[a] promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless" each performance alone would be consideration or that one of them would and there exists a substantial possibility that the one alternative which is not consideration will be eliminated before the promisor exercises its choice.

25. See Doubleday & Co. v. Curtis, 763 F.2d 495, 500 (2d Cir. 1985) ("Where the satisfactory performance of one party is to be judged by another party—New York courts have required the party terminating the contract to act in good faith . . . . This principle—that a contract containing a "satisfaction clause" may be terminated only as a result of honest dissatisfaction—would seem especially appropriate in construing publishing agreements. To shield from scrutiny the already chimerical process of evaluating literary value would render the "satisfaction" clause an illusory promise, and place authors at the unbridled mercy of their editors."); Rohde v. Massachusetts Mut. Life Ins. Co., 632 F.2d 667, 669 (6th Cir. 1980); Mattei v. Hopper, 330 P.2d 625, 627 (Cal. 1958); Cotten v. Deasey, 766 S.W.2d 874, 878 (Tex. App. 1989).

26. See Wood v. Lucy, Lady Duff-Gordon, 118 N.E. 214, 214 (N.Y. 1917) (Cardozo, J.) (implying a duty to make reasonable efforts and on that basis rejecting the argument that the plaintiff had not bound himself "to anything"); Richard Bruce & Co. v. J. Simpson & Co., 243 N.Y.S.2d 503, 506 (N.Y. App. Div. 1963); Mezzanotte v. Freeland, 200 S.E.2d 410, 414 (N.C. Ct. App. 1973) ("A promise conditioned upon an event within the promisor's control is not illusory if the promisor also impliedly promises to make reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it has in fact occurred." (internal quotations omitted)).

27. See UCC § 2-306(1); cmt. 2 (1977) ("Under this Article, a contract for output or requirements is not too indefinite since it is held to mean the actual good faith output or requirements of the particular party. Nor does such a contract lack mutuality of obligation since . . . the party who will determine quantity is required to operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade . . . ."); id. cmt. 5 ("An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems . . . .").
cal promise is a promise in name but not in actuality, being illusory, then consideration is lacking. Stated another way, an illusory promise is not consideration.29 While worthy of discussion (and recently challenged30), the illusory promise rule is animated by different concerns from those requiring the mutuality of obligation doctrine that recommends that both promises bind, as I explain in Parts II.C and III.31 I therefore omit discussion of the illusory promise rule except briefly in Part III’s discussion of authorities which overrule or abandon mutuality of obligation.

This paper also does not discuss equity’s mutuality of remedy doctrine. This doctrine is ably discussed in a number of sources.32 In the earliest reported equity cases, equity’s mutuality of remedy looks a great deal like the law’s mutuality of obligation doctrine. Perhaps this is because the common law reports of that period (before say, 1750) do not discuss whether a promise is binding in the sense that it creates an obligation. Instead, the discussion centers around whether a promise is actionable—whether the law gives a remedy for its breach. Thus, at the earliest times both law and equity courts discussed whether remedies were mutual.33 In early chancery reports, from perhaps 1600 onward,34 the chancery occasionally declared that it would follow the law generally with regard to which promises were actionable.35 Accordingly, in some early mutuality of remedy cases in

28. See UCC § 2-306(2) (“A lawful agreement by either the seller or the buyer for exclusive dealing in the kind of goods concerned imposes unless otherwise agreed an obligation by the seller to use best efforts to supply the goods and by the buyer to use best efforts to promote their sale.”); id. cmt. 5 (“An exclusive dealing agreement brings into play all of the good faith aspects of the output and requirement problems . . . .”); supra notes 26 & 27.
30. See Eisenberg, Probability & Chance, supra note 2, at 1012-18 (arguing that courts should abandon the illusory promise doctrine).
31. See infra text accompanying notes 102-85 & 210-13 and especially notes 222-23.
33. As to the law decisions, see infra text accompanying notes 65-120. As to equity decisions, see infra notes 35-37 and accompanying text.
34. Chancery reports extend back only to the mid-1500s, and between that date and 1660, reporting was incomplete and haphazard. See F.W. MATTLAND, EQUITY: A COURSE OF LECTURES 9 (John Brunyate, ed., 2d ed. 1936). The Yearbooks, reports of law proceedings, in contrast, date back as far as the 13th century.
35. See Marquis of Normanby v. Duke of Devonshire, 2 Freeman 216, 216, 22 Eng. Rep. 1169, 1169 (Ch. 1697) (“Where no action at law will lie to recover damages, there this court will not execute the agreement in specie, for equity will never make that a good agreement which is not good by law.”); Anonymous, Cary 5, 5,
equity, the court merely recites the mutuality of obligation doctrine taken from the law courts. In other, later cases, a different doctrine emerges: that a court of equity will not grant specific relief unless the other party to the transaction was also entitled to specific relief or some other equivalent equitable remedy. This conclusion is premised on the notion that remedies in equity and at law were unequal: one party’s remedy only at law did not cure this defect. This later holding, which added a layer of doctrine and theory that the law’s mutuality doctrine did not include, became equity’s mutuality of remedies doctrine. While the equity doctrine was clearly related to law’s mutuality of obligation doctrine, and further comparison would be interesting, equity’s mutual remedy doctrine deserves closer coverage than a specific look at law’s mutuality of obligation doctrine should uncover. Further discussion is therefore omitted. A number of other notions that lawyers occasionally and incorrectly call mutuality of obligation are mentioned in the margin.

21 Eng. Rep. 3, 3 (Ch. c. 1570-1602) ("Upon nudum pactum there ought to be no more help in Chancery than there is at the common law ... ").

36. See, e.g., Bromley v. Fettiplace, 2 Freeman 245, 246, 22 Eng. Rep. 1187, 1187 (Ch. 1700) ("It was said, that generally this court will not execute an agreement in specie, but when the agreement is such that an action at law will lie for damages for the nonperformance of it"; but giving exceptions in equity to this rule and in the end holding that the return promise was illusory because conditional on the whim of the promisor); Bromley v. Jefferies, 2 Vern. Ch. Cases 415, 23 Eng. Rep. 887 (Ch. 1700) (same case as Bromley v. Fettiplace). In some early equity cases, such as Armiger v. Clarke, 2 Eq. Cas. Abr. 19, 22 Eng. Rep. 16 (Ch.), Bunb. 111, 145 Eng. Rep. 614 (Ex. 1722), that the "remedy was not mutual" means that a condition on one party's performance had failed. See also Lewis v. Lord Lechmere, 2 Eq. Cas. Abr. 20, 22 Eng. Rep. 17 (Case No. 17); 2 Eq. Cas. Abr. 689, 22 Eng. Rep. 579 (Case No. 8) (Ch. 1722).


38. See Lewis v. Lord Lechmere, 10 Mod. 503, 88 Eng. Rep. 828, 829 (K.B. 1722) (stating in dicta: "The Lord Chancellor was of opinion, that the remedy the vendor had at law upon the articles was not adequate to that of a bill in equity for a specific performance").

39. See Yorio, supra note 32, at 127-42 (attributing the entire doctrine as here stated to Lord Fry's 1858 equity treatise, LORD FRY, A TREATISE ON THE SPECIFIC PERFORMANCE OF CONTRACTS (1858)).


41. A possible additional facet to the mutuality of obligation doctrine required that each mutual promise become an actual, binding promise at the same time that
Now on to the history of mutual promises and the mutuality of obligation doctrine.

II. THE DEVELOPMENT OF THE MUTUAL PROMISE RULE

Exactly when the common lawyers first formulated the mutual promise rule, that a mutual promise is consideration, is uncertain. English pleadings show that various mutual promise cases were brought in the form of action called "assumpsit" in the first half of the other promise becomes an actual, binding promise; in other words, both must become bound at the same time. See Farnsworth, supra note 18, § 3.2. This aspect of mutuality of obligation is probably the least obvious. It is often assumed to be within the general rules itself, because if the parties become bound by mutual promises but not at the same time, then at some point one is bound but the other is not, which would violate the general rule. This paper omits further discussion of this aspect of mutuality of obligation because this aspect has been subsumed wholly into the law of assent and is therefore no longer part of the consideration-related doctrine primarily discussed in this paper. An outline of how this change occurred is sketched in A.W.B. Simpson, Innovation in Nineteenth Century Contract Law, in LEGAL THEORY AND LEGAL HISTORY 171, 185 (1987). Mutuality of obligation does not mean that the bargain must be equal. See Kinley Corp. v. Ancira, 859 F. Supp. 652, 657-59 (W.D.N.Y. 1994); City of Chicago Heights v. Crotty, 679 N.E.2d 412, 414 (Ill. App. Ct. 1997). It also does not mean that "every obligation or right is... met by an equivalent obligation or right in the other party." City of Chicago Heights, 679 N.E.2d at 414; see Laclede Gas Co. v. Amoco Oil Co., 522 F.2d 33, 36-37 (8th Cir. 1975) (holding irrelevant that one party has a right to terminate though the other does not). This paper does not discuss mutuality of assent, which means simply that both parties must have assented, In re Broaddus Hosp. Ass'n, 159 B.R. 763, 765 (Bankr. N.D. W. Va. 1993); Reed v. Citizens Ins. Co. of America, 499 N.W.2d 22, 25 (Mich. Ct. App. 1993); Corbin, supra note 2, § 152.

42. Common lawyers until the 1800s classified law within certain procedural forms called "forms of action." (We 20th century lawyers classify laws more theoretically, by contract, property, tort, etc.) Lawyers still use the names of some of these forms of action: trespass, debt, covenant, account, though their meanings have changed. A lawyer placed his action within a form when pleading. Complaining that the defendant owed a debt meant that laws for the form of action debt applied to the suit. Complaining that the defendant owed a debt meant that laws for the form of action debt applied to the suit. Complaining that the defendant had committed a trespass meant that trespass laws applied. Assumpsit was a sub-set of trespass on the case, which was itself a subset of trespass. Literally, assumpsit means undertaking, or, in Latin, "he has undertaken." To undertake something by agreement or promise and not to do it after having undertaken it came over a period of many years (from perhaps 1400 to 1530 or so) to be thought of as a kind of trespass. Cf. Robert C. Palmer, ENGLISH LAWS IN THE AGE OF THE BLACK DEATH 170-213 (1993) (describing numerous writs issued by Chancery between 1348 and the 1380s assuming that nonfeasance was actionable; noting that 15th century courts recanted and refused to acknowledge that nonfeasance could be actionable in trespass, only to change their minds again in the 16th century). As one might suspect, the forms of action covenant and debt also remedied broken promises in certain contexts. But assumpsit procedures included a jury trial and often made available broader relief than debt and covenant procedures, so some plaintiffs preferred assumpsit. From around the 1510s onward plaintiffs' lawyers sought to expand the reach of the assumpsit form in the breach of promise area. The judges
the sixteenth century, as early as 1518, but these pleadings do not mention consideration. Lucy v. Walwyn, (1561), is the first known, reported assumpsit decision to discuss consideration by name, as a requirement for recovery in assumpsit. And the Lucy facts show a promise made reciprocally for another promise. But the report of the case does not mention the mutual promise rule. At an Inner Temple Moot in 1562, Thomas Gawdy (later a Justice on the Queen's Bench) said that a promise to convey land given reciprocally for a promise to pay for the land ought to be enforceable in an assumpsit "even if no money was paid." Keilway disagreed, however, on the grounds that no money was paid "in quid pro quo" for the promise. Anthony Gell, reporter of both Lucy and the moot, noted the similarity of both. The mutual promise issue appears to have been in vogue but unresolved at this early date.

in the royal courts fulfilled many plaintiffs' lawyers hopes, and within a century assumpsit had come to cover even breaches also remedied in debt and covenant. Assumpsit actions expanded so quickly into the business of compensating for broken promises that the courts felt a need to restrain the actions. The doctrine of consideration filled this function. The common law courts declared that in assumpsit only a promise made upon a sufficient consideration would be actionable. The first case to require a valid consideration occurred in perhaps 1539, or around that time. See David Ibbetson, Assumpsit and Debt in the Early Sixteenth Century: The Origins of the Indebitatus Count, 41 Cambridge L.J. 142, 142 (1982). For the next 70 or 80 years, and most actively during the reigns of Elizabeth and James, the courts in case after case tried to sort out exactly when they would allow recovery in assumpsit for breach of promise and when not. Consideration, whatever it meant, was almost the only limitation the courts placed on assumpsit actions for breach of promise.

43. See Baker, Legal Profession, supra note 8, at 378-79 & n.42; Speelman's Reports, supra note 8, at 268 (discussing Fyneux v. Clyfford (1518), 288 n.2, and Shawe v. Duraunt (1529)).
44. See Baker & Milson, Sources, supra note 8, at 485.
45. See Baker, Legal Profession, supra note 8, at 379.
46. See id. at 378-83.
47. See Baker & Milson, Sources, supra note 8, at 485-87.
48. Thomas Gawdy (d. 1589) entered the Inner Temple in 1549. He was summoned to take the degree of serjeant at law in 1558, but the writ abated by Queen Mary's death. His appointment as serjeant then waited until 1567. Gawdy was appointed justice of the Queen's Bench in 1574 and knighted in 1578. He remained on the bench until he died in 1589. Coke described him as "a most reverend judge and sage of the law, of ready and profound judgment, and of venerable gravity, prudence, and integrity." 4 Coke 54a, 76 Eng. Rep. 1007, 1012.
49. See Baker & Milson, Sources, supra note 8, at 487. Though the parties in Lucy exchanged promises, Lucy's facts can be interpreted alternately as a promise given in exchange for a future performance. See id. at 381.
50. Robert Keilway (1497-1581) was autumn reader at the Inner Temple in 1547, serjeant-at-law as of 1552, and treasurer of the Inner Temple in 1557-58. Keilway's name is known chiefly for law reports published under his name in 1602 and republished many times since.
51. See Baker & Milson, Sources, supra note 8, at 487-88.
52. See id.
Probably the first report of the mutual promise rule itself is *West v. Stowell* (1577), which involved a wager. Stowell was engaged in an archery match with Sir Charles Howard, Lord Effingham. West, a bystander, bet Stowell £10 that Effingham would beat Stowell in the match. West and Stowell's bet, like most wagers, was a mutual promise, each promising to pay if he lost the bet. Effingham won the match, but Stowell refused to pay West. West brought an action in assumpsit. Justice Mounsen said that West's "counter promise is a reciprocal promise, and so a good consideration." But Justice Manwood disagreed, claiming that West, a mere bystander, did not have enough invested in the match to enforce the bet. The report does not say who won the lawsuit.

54. Charles Howard (1536-1624), Baron Howard of Effingham, Earl of Nottingham. Charles Howard was Queen Elizabeth's first cousin once removed. Prior to 1577 he had served briefly as an ambassador to France (1559), a general of the horse in suppression of a northern rebellion (1569), a member of parliament twice (1562 & 1572), and as commander of a squadron of ships (1570). He was knighted in 1574. He was appointed in 1585 lord admiral of England and in 1587 commander-in-chief of the navy and army. Sir Francis Drake was his second in command in 1588 when the English defeated the Spanish Armada. He remained in command of the navy until 1619.
55. Robert Mounsen (d. 1583) was called to the bar in 1550, was reader in 1565 and 1572, was made serjeant in 1574 and then later in the same year a judge of the Common Pleas. He also served approximately ten years in parliament between 1553 and 1572. After the Queen disagreed with how he handled a case in 1579, he resigned or was forced out of office.
57. Roger Manwood (1525-92) was appointed judge of the Common Pleas in 1572. He was knighted and appointed lord chief baron of the Exchequer in 1578. Manwood was notorious for seeking to buy and sell government offices, including various positions as judge. Just before Dyer, Chief Justice of the Common Pleas, died in 1582, Dyer wrote to Queen Elizabeth that he wanted William Peryam to take his place. Manwood is believed to have offered a great deal of money to have the position. See *1 Reports From the Lost Notebooks of Sir James Dyer* xxxiii & n.15 (109 Selden Society, J.H. Baker ed. 1994). The Queen gave it to Edmund Anderson. See *id.* Manwood founded a grammar school in Kent, Sir Roger Manwood's School, still in operation. The school's web page can be found at http://www.rmplt.co.uk/eduweb/sites/srms/index.html. The link marked "The School" gives a brief history of the school and praises Manwood's foresight in planning for the school's success. Thanks to Brian Simpson for information about the school.
58. Manwood argued that there was consideration between the participants in the match, for they actually do something in relation to the promise: prepare equipment, attend the match, labor in shooting, and travel "up and down between the marks." *West*, 2 Leon. at 154, 74 Eng. Rep. at 437-38, reprinted in Baker & Milsom, Sources, supra note 8, at 494-95. West as a spectator did none of these things.
59. See *West*, 2 Leon. at 154, 74 Eng. Rep. at 437-38, reprinted in Baker & Milsom, Sources, supra note 8, at 494-95; see also Baker, Legal Profession, supra note 8, at 382 & n.45; Simpson, supra note 8, at 459-60.
Various reports between 1578 and 1589 record the mutual promise rule. Baker lists no fewer than eight reports of discussions during this period. Fuller's Case refers to it. The rule seems to have been settled by the end of the period, when a brief report of Strangeborough v. Warner recorded tersely: "[A] promise against a promise will maintain an action upon the case." The mutual promise rule is employed in much the same terms today; a "mutual promise" constitutes consideration allowing recovery in contract. The mutuality of obligation doctrine appears frequently in these early cases discussing the mutual promise rule.

III. THE DEVELOPMENT OF THE MUTUALITY OF OBLIGATION RULE

A. Genesis and Confusion

The early mutual promise cases show that the mutuality of obligation doctrine—that both mutual promises should bind their promisors—was integral to the operation of the mutual promise rule. At this early date, however, no lawyer talked of mutuality of "obligation." The lawyers instead discussed only whether a promise was actionable. Indeed, whether a party exchanging promises could countermand its promise before any performances occurred or suit was brought remained the subject of judicial decision well into the seventeenth cen-

60. See Baker, Legal Profession, supra note 8, at 382-83 & nn.45, 46, & 48.
61. See id.
64. Compare Kirkby v. Coles, Cro. Eliz. 137, 78 Eng. Rep. 394 (K.B. 1588) (Wray & Clench, JJ.) (agreeing that this action properly "was grounded upon the promise" given reciprocally), Gower v. Capper, Cro. Eliz. 543, 78 Eng. Rep. 790 (K.B. 1596) ("[A] promise against a promise is a sufficient ground for an action."); Wichals v. Johns, Cro. Eliz. 703, 78 Eng. Rep. 933 (K.B. 1599) (Popham & Clench, JJ.) (opining that an action was "well enough; for there is a mutual promise, the one to the other"), Nicholas v. Raynbred, Jenk. 296, 145 Eng. Rep. 780 (K.B. 1599) (Popham & Clench, JJ.) (opining that an action was "well enough; for there is a mutual promise, the one to the other"), Nicholas v. Raynbred, Jenk. 296, 145 Eng. Rep. 215, Hob. 88, 80 Eng. Rep. 238 (1615) ("[M]utual assumpsits ... make the consideration."); Ernely v. Falkland, Hardres 104, 145 Eng. Rep. 403 (1655) ("[T]he consideration was admitted ... to be good, being grounded upon ... a reciprocal promise."); and Peters v. Opie, 1 Vent. 177, 86 Eng. Rep. 120 (1671) (Hale, J.) (opining that "the reciprocal promise [might be] the foundation of the consideration"). with Orange Improvements Partnership v. Cardo, Inc., 384 F. Supp. 85, 92 (D. Conn. 1979) ("[S]ufficient consideration ... can take the form of mutual promises."); Odom Antennas, Inc. v. Stevens, 866 S.W.2d 279, 281 (Ark. Ct. App. 1998) (affirming that mutual promises were consideration for each other), Solimini v. Thomas, 688 N.E.2d 356, 361 (Ill. App. Ct. 1997) ("In addition, mutual ... promises provide sufficient legal consideration to support each other."); and Allied Disposal, Inc. v. Bob's Home Service, Inc., 595 S.W.2d 417, 419 (Mo. Ct. App. 1980) ("Mutual promises imposing some legal duty or liability on each promisor are sufficient consideration to form a valid, enforceable contract.").
What is later called mutuality of obligation is in the early period a reciprocity or mutuality of remedies.

This mutuality of remedies doctrine was litigated as early as 1578, and probably earlier. An objection that no reciprocal remedy existed prompted the discussion of the mutual promise rule in *West v. Stowell*, implying that the doctrine had been discussed before, perhaps in an earlier case. The phrase "equall remedie" appears in a report at least by 1579. Baker records that the doctrine appears continuously throughout the period 1579 through 1587 in conjunction with the mutual promise rule. The principle was the statement most commonly appearing with the mutual promise rule in the last quarter of the sixteenth century.

*Wichals v. Johns* illustrates how the mutuality of remedy rule appears in early reports. Wichals promised to pay £120 on a debt that Johns owed to Rogers, in consideration that Johns promise to pay Wichals £120 on request. When Wichals sued Johns, Justices Popham and Clench said:

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65. See, e.g., Hurford v. Pile, Cro. Jac. 483, 79 Eng. Rep. 412 (1618); Simpson, supra note 8, at 466-70. But see, e.g., Ward v. Grimwise, Harv. MS 105b, f.23 (C.P. 1599) (“Acceptance of the undertaking implies a certain contract and assumpsit on the part of the plaintiff.”).

66. *West v. Stowell*, 2 Leon. 154, 74 Eng. Rep. 437 (C.P. 1577), reprinted in Baker & Milson, Sources, supra note 8, at 494, is discussed in detail supra at text accompanying notes 54-60 and again infra text accompanying notes 90-93, 146-47. The first reported case to recite the mutual promise rule, *West* links the mutual promise rule to the notion of reciprocal remedies. Defense counsel objected to plaintiff's suit "that here is not any sufficient consideration; for the promise of the plaintiff to the defendant, non parit actionem, for there is not any consideration upon which it is conceived, but is onely, nudum pactum, upon which the defendant could not have an action against the plaintiff." *West*, 2 Leon at 154, 74 Eng. Rep. at 437 (emphasis added). In response, Mounsen, J., argues "that here the consideration is sufficient, for here this counter promise is a reciprocal promise, and so a good consideration." *Id.* He later states, "A cast at dice alters the property, if the dice be not false; wherefore then is there not here a reciprocal action?" *Id.*, 2 Leon at 154, 74 Eng. Rep. at 438. The issue is not settled in the context of this case, for Manwood, J., replies:

Such a reciprocal promise betwixt the parties themselves at the match is sufficient; for there is consideration good enough to each, as the preparing of the bows and arrows, the riding or coming to the place appointed to shoot, the labour in shooting, the travel in going up and down between the marks: but for the bettors by, there is not any consideration.


67. The phrase is from Anon. (K.B. 1579), L.I. MS Misc. 488, p. 61, reported in Baker, Legal Profession, supra note 8, at 383 n.48.

68. See Baker, Legal Profession, supra note 8, at 383 n.45, 46, & 48 (listing eight discussions purportedly mentioning the doctrine); see also, e.g., Ibbetson, supra note 8, at 86-87.


70. John Popham (d. 1607) was the queen’s attorney general for 11 years, from 1581-92. Gossip during Popham’s life held that he had been a highway robber before
[Here] there is a mutual promise, the one to the other; so that if the plaintiff doth not pay it to Rogers, the defendant may have his action against him: and so also the defendant shall be charged as to him; and a promise against a promise is a good consideration. 72

Fuller's Case 73 also discusses the mutuality principle. In Fuller's Case, the defendant stated to an elder son that, if the son "should be willing to give his consent" that the son's father convey the father's land to another, the defendant "would be willing" to give the son forty shillings. The son later sued for the forty shillings. Lawyers involved in the case seemed to agree that the defendant's statement amounted to a promise but were uncertain whether the son was bound or not. Justice Periam 74 said that

in this case the son ought to promise to give his consent in consideration of the other promise, or otherwise A [the defendant] has no remedy if the son is unwilling to give his consent, and if it is thus the case that each one has a remedy against the other it is a good assumption. 75

Accordingly, Sergeant Fermor for the defendant objected that "the undertaking was only on one side, and the other was free if he wished to give his consent or not." 76 Judgment in the end went to the son, probably because he had already performed by giving consent. This kind of discussion remained a companion to the mutual promise rule from Elizabethan times forward. 77 Coke even mentions it in his commentary on Littleton. 78

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71. John Clench (d. 1607) was appointed a baron of the exchequer in 1580 and in 1584 was transferred to the Queen's Bench.
74. William Periam or Peryam (1534-1604) was appointed judge of the Common Pleas in 1581. He was promoted to Chief Baron of the Exchequer and was knighted in 1593. He presided in the Exchequer until his death.
75. Simpson, supra note 8, at 637.
76. Id.
77. See, e.g., Peters v. Opie, 1 Vent. 147, 177, 214, 86 Eng. Rep., 120, 144 (1671) (Twisden, J.) ("[A]n action lies . . . because of the mutual remedy."). Consider the following from Blackstone:
If the husband be of years of discretion and the wife under 12, when she comes to years of discretion, he may disagree as well as she may; for in contracts the obligation must be mutual; both must be bound, or neither.
1 William Blackstone, Commentaries *436. Blackstone may have been quoting Coke. See infra note 78.
78. Coke wrote:
If a man of the age of 14 marry a woman of the age of 10, at her age of 12, he may as well disagree as she may, though he were of the age of consent, because in contracts of matrimony either both must be bound, or equal electing of disagreement given to both; and so e converso, if the woman be of the age of consent and the man under.
Though the early mutual promise cases show that judges thought the mutuality of remedies doctrine necessary, these cases also show that judges were confused about the rule's reach and purpose. For instance, reports show that some judges held to a negative, strong form of the mutuality of remedy doctrine—that lack of a reciprocal remedy for the defendant meant that the plaintiff's promise could not be consideration. But some judges held otherwise.

This uncertainty shows up especially in wager cases. For example, in Butterye v. Goodman\(^7\) (1583), a suitor for the hand of a certain woman made a deal with the woman's brother. The brother promised that the woman was worth £1500 (in property). The consideration for this promise was the suitor's counter-promise that, if the girl was worth £1500, the suitor would pay the brother £200. The deal amounted to a bet on the woman's monetary worth. The woman was not worth £1500, and the suitor did not marry her. Instead, he sued her brother for breach of promise. Notwithstanding the suitor's promise was mutual, two judges, Wray\(^8\) and Ayloffe,\(^9\) thought it was not consideration because the brother had no remedy on it for the £200.\(^9\) Indeed, only one party could have a remedy in such a wager-like transaction, because only one of them could win the wager.\(^8\)

Not all the judges agreed, however. One judge, Gawdy, J.,\(^8\) thought there was consideration in Butterye notwithstanding. The mutual promises alone appear to have been enough for Gawdy—no mutual remedy was necessary. Gawdy's view of wager cases won out in the end. Courts decided conclusively at least by the mid-1600s that

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\(^7\) See Baker, Legal Profession, supra note 8, for a discussion of Butterye.

\(^8\) Christopher Wray (1524-92) was admitted as a law student at Lincoln's Inn at age 20 or 21. He was reader in autumn 1562, at about age 38, and again in 1567. Wray also had a parliamentary career, from 1553-67, and again later in 1571, when he was appointed speaker of the commons. Wray was appointed justice of the Queen's Bench in 1572, at about age 48, and chief justice in 1574. He held the chief justiceship for 17½ years, until he died in 1592. Coke praised Wray's "profound and judicial knowledge, accompanied with a ready and singular capacity, grave and sensible elocution, and continual and admirable patience." 3 Coke 26a, 76 Eng. Rep. 684, 687.

\(^9\) William Ayloffe (d. 1585) was judge of the Queen's Bench by at least 1579.

\(^8\) See Baker, Legal Profession, supra note 8, at 383.

\(^9\) A similar objection could be made to Justice Mounsen's statements in West v. Stowell, 2 Leon. 154, 74 Eng. Rep. 437-38 (C.P. 1577), which involved a wager on the outcome of an archery contest. Perhaps this factual twist in West prompted the defense to object that no reciprocal remedy was available. See supra note 66 and infra notes 95-98 and accompanying text.

\(^8\) "[T]he same Thomas Gawdy who had advocated the recognition of mutual promises in 1562 . . . ." Baker, Legal Profession, supra note 8, at 382.
assumpsit based on mutual promises lay for wagers even though only one party could win and no mutual remedy could exist.\footnote{Later wagering cases give a remedy in assumpsit as “grounded upon... a reciprocal promise.” Ernely v. Lord Falkland, Hard. 103-04, 145 Eng. Rep. 403 (1655); see Bulling v. Frost, 1 Esp. 235, 170 Eng. Rep. 341 (1794) (Kenyon, J.); Jackson v. Colegrave, Carth. 338, 90 Eng. Rep. 797-98 (1695) (“[A] general assumpsit will not lie for money won on a wager, or at play, but it must be laid by way of mutual promises specially.”); Bovey v. Castleman, 1 Ld. Raym. 69, 91 Eng. Rep. 942 (1695); Anon. v. Sterne, 2 Show. K.B. 82, 89 Eng. Rep. 808 (1678) (“[A]t play there are mutual assumpsits”); Walcot v. Tappin, 1 Keb. 56, 83 Eng. Rep. 808 (1662) (enforcing a bet on whether Charles Stuart would be king of England within 12 months); Andrews v. Herne, 1 Lev. 33, 83 Eng. Rep. 283 (1662) (same as Walcot); William Sheppard, Action on the Case 178 (1663) (“There was a wager laid between A and B concerning the quantity of yards of velvet in a cloak, and each of them agreed that if there were ten yards of velvet in the cloak that then they should be delivered to B, and if not to A. This is good and may be pursued accordingly.”); Howard A. Street, The Law of Gaming 363-65 (1937); James B. Ames, Two Theories of Consideration, 13 Harv. L. Rev. 29, 34 (1899); Ibbetson, supra note 8, at 86 n.108 (mentioning a wager case between participants in a contest, Dassett’s Case, founded on mutual assumpsits, which “caused no difficulty” in 1604); see also March v. Pigot, 5 Burr. 2802, 93 Eng. Rep. 471 (1771) (involving two sons who bet against the longevity of their fathers, the winner being the son with the father to die last; the jury enforced the bet, and the court refused to grant a new trial). Compare Smith v. Aiery, 6 Mod. 128, 87 Eng. Rep. 885 (1705) (holding indebitatus assumpsit does not lie for money won at play, and hinting that recovery could be had on mutual promises), Walker v. Walker, 5 Mod. 13, 87 Eng. Rep. 490 (1694) (holding that indebitatus assumpsit does not lie for a wager), and Eggleton v. Lewin, 3 Lev. 118, 83 Eng. Rep. 607 (1683) (same), with Anon. v. Sterne, 2 Show. K.B. 82, 89 Eng. Rep. 808 (1678) (“debt lies at common law for money got at play... ; indebitatus assumpsit lies for a wager”).}

Twenty-five years after \textit{Butterye} the entire court departed openly from the negative, strong form of the mutuality of remedies doctrine in \textit{Bettisworth v. Campion}\footnote{Yelv. 133, 80 Eng. Rep. 90 (K.B. 1608). \textit{Bettisworth} is discussed in detail in Ibbetson, supra note 8, at 87.} (1608). Here, the defendant promised to pay for iron in exchange for the plaintiff’s father’s promise to deliver to the defendant all the iron made in a certain furnace. The defendant had not paid for all of the iron delivered. The plaintiff’s father had died, however, so the plaintiff sued defendant as executor. When the plaintiff won a judgment, the defendant objected that the plaintiff had failed to allege a complete performance of his father’s promise. To this the court answered that no allegation of performance was necessary because “the consideration on each part was the mutual promise the one to the other.”\footnote{Bettisworth, Yelv. at 134, 80 Eng. Rep. at 90.} In this case, however, no action could be had against the plaintiff’s testator father, the reciprocal promisor, because he was dead, and the defendant could not sue the plaintiff for the testator’s breach.\footnote{“[T]he defendant cannot have an action against the plaintiff as executor on the testator’s breach....” Id., Yelv. at 134, 80 Eng. Rep. at 90. Ibbetson explains,} No mutuality of remedy existed. The court overruled
this objection, however. Notwithstanding that the testator's promise was unenforceable, the court explained, "yet the promise ex parte of the defendant continues." Ibbetson notes from an unpublished manuscript report of the case:

It was said that since at the time of the breach of the [testator] . . . , if there had been any breach, [the defendant] was still alive, an action could have been brought against [the testator], and it was the defendant who was at fault for not having done so.98

Thus, by 1608 lack of a present mutual remedy did not mean absolutely that the plaintiff's promise was not consideration for the defendant's.

Bettisworth's position regarding mutual promises may be similar to that taken by Justice Mounsen in West v. Stowell,90 in 1577. West was a wager case (like Butterye): a bet on a shooting contest. Only one party could win, but Justice Mounsen said there was sufficient consideration for the loser's promise, "for here this counter promise is a reciprocal promise, and so a good consideration."91 His comments make clear he thought there was a sufficient reciprocal action. Perhaps he reasoned that there was a reciprocal action before one shooter won the match, and there would have been a reciprocal action had the other party won, and if no action can be had now, it is only because the loser bet poorly, a risk he clearly accepted when making the bet. Or perhaps Mounsen adopted an affirmative view of the mutuality of obligation requirement, that the presence of a mutual promise indicates a reciprocal promise should exist; he asked, after all: "[W]herefore then is there not here a reciprocal action?"92 But Manwood, J., thought no reciprocal action existed, and the report does not settle the dispute.93 Even at that early date the judges did not know what to do with the mutual remedies principle.

Since then, some common lawyers have continuously advocated the consideration-destroying, strong form version of the mutual remedies principle: that unenforceability of one promise means it can not be consideration for another promise. Such a form appeared again in cases in which one of two mutual promises was illegal. Oliver v. Oli-

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89. Ibbetson, supra note 8, at 87. Ibbetson does not identify the source of this rationale directly, but he gives as a source for Bettisworth only Yelv. 183 and L.I. MS Hill 122 f.21. See id. at 87, 108. Yelverton does not report this reason.

90. 2 Leon. 154, 74 Eng. Rep. 437 (1578), discussed supra notes 53-59 and infra notes 146-47, and the accompanying text.


93. "Such a reciprocal promise betwixt the parties themselves at the match [, the shooters, would have been] sufficient." Id., 2 Leon. at 154, 74 Eng. Rep. at 437 (Manwood, J.).
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(1624), for instance, involved a promise given in exchange for a promise to pay interest. Justices Dodderidge and Whitlock agreed that payment of interest, illegal as usury, would not be consideration. Similar arguments from illegal consideration appear in other cases around this time and earlier.

But the application of a negative, strong form mutuality of obligation doctrine to promises to do illegal acts did not imply that the negative doctrine had been adopted in all contexts, as Blaxton v. Pye (1766), proves. In Blaxton, a wagering case like Butterye and West, the judges held to the strong form version with respect to the illegal promise but never mentioned it with respect to the wagering nature of the transaction. Long after Butterye, Parliament declared some but not all wagers illegal, based on the amount of the bet; by 1766 a legal bet could be made against an illegal one. In Blaxton, Pye promised that, if a horse named Elephant won one of two races, Pye would pay Blaxton eight guineas. Reciprocally, Blaxton promised to pay Pye fourteen guineas if Elephant won no race. Elephant won one race, Pye refused to pay, and Blaxton sued for the eight guineas. Plaintiff Blaxton obtained a verdict, but Pye objected that Blaxton’s promise to

95. See id.
96. See also Sanderson v. Warner, Palmer 291, 81 Eng. Rep. 1087, 2 Rolle 239, 81 Eng. Rep. 772 (1622), in which a plaintiff sued on a promise to pay interest, given in consideration for a promise to forbear from suit on a debt. Noy for the defense suggested the promise to pay interest was illegal as usury and therefore invalid as consideration. See id., Palmer at 291, 81 Eng. Rep. at 1088, 2 Rolle at 239-40, 81 Eng. Rep. at 773. The justices reached no conclusion on the legality of the promise, and no further discussion occurred as to whether the promise to pay interest could serve as consideration. See id. In a similar case in 1632, Harris v. Richards, Cro. Car. 273, 79 Eng. Rep. 838 (1632), a promise to pay interest appears to have been held legal. See also Simpson, supra note 8, at 510-18 (discussing generally the validity of contracts involving usury).

Dobbin’s Case, Cro. Eliz. 151, 78 Eng. Rep. 408 (1587), also appears to involve an illegal consideration. There the plaintiff undertook to assign his rights in certain land to the defendant, who promised to pay the plaintiff £40. After a verdict for the plaintiff, the defendant moved in arrest of judgment that the plaintiff’s undertaking was “an unlawful consideration” because performance of it would violate the statute, 32 Hen. 8, c.9. The court dismissed the objection in this case, but the case shows counsel and judges were aware of such arguments and that some thought the argument might win.

98. One such early statute was An Act of Deceitful, Disorderly and Excessive Gaming, 1664, 16 & 17 Car. 2, ch.7, § III, which provided:

[I]f any person . . . play at any of the said games [including cards, dice, tables, tennis, bowls, skittles, shovelboard, cock-fights, horseraces, dog-matches, and footraces], or any other pastimes . . . (other than with and for ready money) or shall bet on [other men’s sides] and shall lose any sum or sums of money, or other . . . things . . . exceeding the sum of one hundred pounds at any one time or meeting, [they] shall not in that case be bound or compelled or compellable to pay or make good the same . . . .
pay fourteen guineas was illegal under a statute outlawing any bet above 10 guineas. Thus, Blaxton "could not possibly lose the fourteen guineas, and therefore ought not to be allowed to win the eight guineas" belonging to Pye. The entire court agreed. So the law at the time of Blaxton was willing to enforce a wager in assumpsit on the strength of the mutual promise rule even though only one party could have an action against the other, as in Butterye, but not if one of the promises was illegal—because then the agreement lacked mutuality of obligation!

B. Later Development and Clarification: Rejection of Negative Mutuality of Obligation

The apparent inconsistency in Blaxton with respect to the mutual remedies rule—that it strips illegal promises of their consideration function but does not so strip the promise made by the loser of a wager—probably never occurred to the court. I suggest it reveals underlying uncertainty about the mutuality of remedies or obligation doctrine itself, even from the beginning. Neither judges nor lawyers were sure what effect the doctrine should have, so lawyers continued to raise it and judges responded as they thought appropriate given the facts and their current understanding. Recall that in 1583 one judge, Gawdy, thought there was consideration in Butterye, notwithstanding that only one party could win the bet and sue the other. And the court in Bettisworth and Justice Mounsen in West felt justified in departing from the negative version of the rule. That lawyers and judges have continued to wrestle with the effect of the rule for 400 years only amplifies the uncertainty as to what the rule was supposed to mean.

99. The statute is the “Statute of Anne,” An Act for the Better Preventing, Excesive, and Deceitful Gaming, 1710, 9 Anne ch. 14, § II.

[|Any person . . who shall . . by playing at cards, dice, tables, or other game or games whatsoever, or by betting on the sides or hands of such as do play any of the games aforesaid, lose to any . . person . . so playing or betting, in the whole, the sum or value of ten pounds, and shall pay or deliver the same, or any part thereof, the person . . losing, and paying or delivering the same, shall be at liberty, within three months then next, to sue for and recover the money or goods so lost, and paid or delivered, or any part thereof, from the respective winner . . thereof, with costs of suit, by action of debt . . . .

The statute did not bar an action by a winner on such a bet, but the court in Blaxton implied that result.


103. See supra text accompanying notes 86-93.
The results in later decisions fall more in line with Bettisworth's, Gawdy's, and Mounsen's view of the rule than with Wray and Ayloffe's negative, strong-form version, however. Courts have generally held throughout the last 400 years that, for purposes of the mutual promise rule, even an unenforceable promise counts as consideration. In other words, courts historically rejected the negative, strict version of the mutuality of obligation doctrine in each case in which the reciprocal counter-promise was declared for some reason unenforceable.¹⁰⁴ This

¹⁰⁴. Marriage cases in particular raised the issue in the common law courts, for invariably one of two promises relating to marriage was alleged to be spiritual and thus not within the jurisdiction of the common law courts. Some argued that because the court would have no jurisdiction to enforce such a promise, no mutual remedy existed on it, and neither promise was good. In these cases, the most common resolution was that the court had jurisdiction. Baker v. Smith, Style 295, 82 Eng. Rep. 722, (1651), contains such an argument but no clear resolution in published reports. In Baker, a man, Smith, and a woman, Baker, traded mutual promises to marry, but then Smith changed his mind and promised Baker 1000£ if she would discharge him of his promise. Smith never paid the money, and Baker sued. Smith’s counsel objected that “there is no temporal consideration alleged, but only a promise to dissolve a contract of marriage, which is a thing illegal, and so no consideration.” Id., Style at 295, 82 Eng. Rep. at 723.

Chief Justice Rolle, in response, said that “engagement to marry is not meerly a spiritual matter.” Id. But the matter was held over till later in the term, and neither the resolution of this issue nor of the case appears in Style. However, Siderfin’s Hebden v. Rutter, 1 Sid. 180, 82 Eng. Rep. 1043, 1 Lev. 147, 83 Eng. Rep. 341 (1664), resolves the argument in favor of allowing both promises to serve as consideration, on the authority of Baker v. Smith. 1 Sid. at 180, 82 Eng. Rep. at 1044 (“Et sur cel declar’ defendant demurr, et fuit dit que ceo ne fuit ascun consideration, car marriage est un matter merement spiritual, et nul ground pur assumpsit icy, mes per Curiam le declar’ & consideration in ceo sont bone, car marriage est un preferment, et le perd de ceo est un temporal perd, et fuit adjudge bone consideration temps Roles Chiefe Justice in Baker & Smith’s case, Sti. 205. 304. Nota, que issue fuit apres joyne & trye in le principal case.”). Siderfin’s report reveals that he did not think all the common law judges agreed, however. 1 Sid. at 181, 82 Eng. Rep. at 1044 (“Nota, jeo fui un councel cest mesme terme in autiel case sur breve de error hors de ceo Court in l’Exchequer-Chamber, mes jeo ne osa insist sur cel pur doubt que le Court ne voil ceo oye . . . .”). Justice Windham mentions the issue in his discussion in Holcroft v. Dickenson, Carter 233, 234-45, 124 Eng. Rep. 933, 935, 1 Freeman 95, 89 Eng. Rep. 70, 3 Keble 148, 84 Eng. Rep. 645 (1673), noting prior resolutions of the issue in favor of enforceability. When a similar argument about mutuality of obligation was made finally in Holt’s time, in Harrison v. Cage, 5 Mod. 411, 87 Eng. Rep. 736 (1698), Holt and his colleagues had merely to recite prior resolutions rejecting such objections. See Harrison, 5 Mod. at 411-12, 87 Eng. Rep. at 736-37. Perhaps Holt’s explanation is more explicit in Harrison because defense counsel admitted that the man would be liable for breach of promise to marry. In Harrison, the plaintiff was a man. Holt reasoned from the mutuality of obligation doctrine that if a man would be liable, a woman would be, too, and on this ground granted a remedy to the male plaintiff. See id., 5 Mod. at 412, 87 Eng. Rep. at 737. Holt’s use of the mutuality of obligation rule is affirmative in the sense I suggest the rule should be understood. See infra text accompanying notes 137-38.
rejection occurred in cases in which the counter-promise was void or voidable for infancy, insanity, fraud, duress or when the promise was unenforceable under the statute of frauds (though with some exception in this last case).

105. The promise of an infant was voidable at common law, meaning that an action founded on it could be avoided by pleading the promisor’s infancy. See, for example, Coke’s argument in Stone v. Withepoole, Owen, 94, 74 Eng. Rep. 924, 1 Leon. 114, 74 Eng. Rep. 106, Cro. Eliz. 126, 78 Eng. Rep. 383 (1588). In a mutual promise case in which the plaintiff was an infant, it would be natural to argue that the infant’s promise, being voidable, was not consideration. This happened in Forrester’s Case, 1 Sid. 41, 82 Eng. Rep. 958 (1661), where the argument was rejected per curiam and the infant allowed to recover. Holt, J., reiterated this position in Holt v. Ward Clarencieux, 2 Str. 937, 93 Eng. Rep. 954 (1732). See also Monaghan v. Agricultural Fire Ins. Co., 18 N.W. 797, 805 (Mich. 1884). A similar issue was addressed in Smith v. Bowen, 1 Vent. 51, 86 Eng. Rep. 36 (1669), in which the defendant promised in consideration that the infant would permit the defendant to enter the infant’s close, cut the infant’s grass, make it hay, and carry it away, that the defendant would pay six pounds for the hay. The defendant demurred to the declaration, “supposing it to be no consideration; for the infant was not bound by his permission, but might sue him notwithstanding.” Smith v. Bowen, 1 Vent. at 51; 86 Eng. Rep. at 37. In this case as well the court gave judgment to the infant plaintiff.

106. See Harmon v. Harmon, 51 F. 113 (C.C. N.D. Ill. 1892); San Francisco Credit Clearing House v. MacDonald, 122 F. 964, 965 (Cal. Ct. App. 1912); Caldwell v. Ruddy, 1 P. 339, 342 (Idaho 1881); Allen v. Barryhill, 27 Iowa 534, 1 Am. Rep. 309 (1869) (“[I]t is no defense to the sane party merely to show that the other party was non compos mentis at the time the contract was made.”); Atwell v. Jenkins, 40 N.E. 178, 179-80 (Mass. 1895); Hoadley v. Hoadley, 155 N.E. 728, 730 (N.Y. 1927).

107. In favor of this proposition, commentators have mostly cited cases involving reciprocal marriage promises in which the man was already married. See, e.g., Kelley v. Riley, 106 Mass. 339, 8 Am. Rep. 336 (1871); Wild v. Harris, 7 C.B. 999, 137 Eng. Rep. 395 (1849); see also Plympton v. Dunn, 20 N.E. 180 (Mass. 1889) (misrepresentation). Various cases allow fraud victims to affirm a contract and sue for its enforcement. See, e.g., National Bank of Decorah v. Robison, 203 N.W. 295 (Iowa 1925) (holding that a fraud victim may choose to stand on the contract and sue for its breach); Wood v. Dudley, 176 N.Y.S. 494 (N.Y. App. Div. 1919) (same as Robison); Larsen v. Chapin, 265 P. 441 (Or. 1928) (same as Robison).


109. See, e.g., Beckwith v. Clark, 188 F. 171, 175-76 (8th Cir. 1911); Cavanaugh v. Casselman, 26 P. 515 (Cal. 1891); Hodges v. Kowing, 18 A. 979, 980 (Conn. 1889); Burk v. Mead, 64 N.E. 880, 882 (Ind. 1902); Engler v. Garrett, 59 A. 648, 649-50 (Md. 1905).

110. See, e.g., Houser v. Hobart, 127 P. 997 (Idaho 1912); Willebrandt v. Sisters of Mercy, 152 N.W. 88 (Mich. 1915); Wilkinson v. Heavenrich, 26 N.W. 139, 140 (Mich. 1886) (“It is a general principle in the law of contracts, but not without exception, that an agreement entered into between parties competent to contract, in order to be binding, must be mutual; and this is especially so when the consideration consists of mutual promises. In such cases, if it appears that [because of application of the statute of frauds] the one party never was bound on his part to do the act which forms the consideration for the promise of the other, the agreement is void for want of mutuality . . . . Such was the case here.”)
Calamari and Perillo suggest that mutuality of obligation doctrine—in a negative, strong form as they describe it—may yet apply in mutual promise cases in which one promise is illegal. The doctrine appears occasionally in decisions stating that mutual promises are unenforceable when performance of one promise would constitute an illegal act. And the doctrine’s influence is still seen in the law’s oft-used label “illegal consideration,” which is a ground for voiding a contract or at least excising from it the illegal portions. Some consideration-destroying application of the mutuality doctrine appears theoretically possible here. But the overwhelming majority of cases voiding a contract for illegality now rest on the policy that courts should refrain from assisting in illegality or a violation of public policy. Some seem also to say that the public policy or statute in-

111. **Calamari & Perillo, supra** note 9, at 227 & n.85, 889 & n.24. Calamari & Perillo also suggest that a promise void for vagueness will also raise a mutuality of obligation concern. They cite no case for this proposition, but Williston claimed it in 1925. Williston pointed to citations in his treatise in support. See Samuel Williston, *The Effect of One Void Promise in a Bilateral Agreement*, 25 *ColuMn. L. Rev.* 857, 859 (1925). Professor Oliphant in response argued that Williston had confusedly cited illusory promise cases in support of the mutual remedies rule. See Oliphant, *supra* note 1, 28 *ColuMn. L. Rev.* at 998. I am persuaded by Oliphant’s argument that a promise too vague to allow enforcement is not a promise, and think that the correct rule to apply is the illusory promise rule rather than the mutual remedies rule.


113. *See, e.g.*, SEC v. Infinity Group Co., 993 F. Supp. 324, 331 (E.D. Pa. 1998) (“Illegal consideration is invalid consideration and thus cannot shield ill-gotten gains from disgorgement.”); Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court, 949 P.2d 1, 12 (Cal. 1998) (“Illegal contracts, however, will be enforced under certain circumstances, such as when only a part of the consideration given for the contract involves illegality. In other words, notwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement.”); Minor v. McDaniel, 435 S.E.2d 508, 510 (Ga. Ct. App. 1993) (“If the consideration is illegal in whole or in part, the whole promise fails.” (citing Ga. Code Ann. § 13-3-45)); Quiring v. Quiring, 944 P.2d 695, 701 (Idaho 1997) (“An illegal contract is one that rests on illegal consideration consisting of any act or forbearance which is contrary to law or public policy.”).

fringed by the contract prohibits enforcement.\textsuperscript{115} Moreover, courts appear ready and willing to save all parts of an illegal contract that can be severed.\textsuperscript{116} The more cases one reads in this area, the more readily one feels that courts truly have forgotten the application of the mutuality of obligation doctrine to illegal contracts.

*Hay v. Fortier*\textsuperscript{117} demonstrates a theoretical use for the negative, strong form mutuality of obligation doctrine. *Hay* involved an agreement between a surety and a creditor. When the principal debtor had failed to pay, the surety sought an extension of time from the creditor. In exchange for the creditor’s promise to forbear suit, the surety promised to pay in installments the entire amount due. The court reasoned in dicta that the creditor’s promise to forbear was initially without consideration, because the surety’s promise was only to perform a prior duty. The creditor’s promise was thus unenforceable. That meant that the surety’s promise to pay in installments was also without consideration, under the negative, strong form of the mutuality of obligation doctrine. In the end, however, the court found the mutuality of obligation doctrine irrelevant because the creditor had per-


\textsuperscript{116} \textit{See}, e.g., \textit{Lulirama Ltd., Inc. v. Axcess Broad. Servs., Inc.}, 128 F.3d 872, 880 (5th Cir. 1997) (“Under Texas contract law, illegal contracts are generally unenforceable. However, a court will sever the illegal portion of the agreement and enforce the remainder if the parties would have entered the agreement absent the illegal portion of the original bargain.”) (internal citations and quotations omitted); \textit{Birbrower, Montalbano, Condon & Frank, P.C. v. Superior Court}, 70 Cal. Rptr. 2d 304, 315 (Cal. 1998) (“[N]otwithstanding an illegal consideration, courts may sever the illegal portion of the contract from the rest of the agreement.”); \textit{Bryant v. City of Atlantic City}, 707 A.2d 1072, 1090 (N.J. Super. Ct. App. Div. 1998) (“It is well established that a court can sever an illegal portion of a contract that does not defeat the agreement’s central purpose.”).

\textsuperscript{117} 102 A. 294 (Me. 1917).
formed its promise, and the creditor's performance counted as consideration even though the creditor's promise would not.118

Though a consideration-destroying function remains theoretically possible in a case like Hay in which no performance has occurred, I would recommend against such an application of the mutuality of obligation doctrine. The rule rendering invalid as consideration a promise to perform a prior legal duty is generally understood to be a safeguard against breach of public policy, extortion, economic duress, lack of good faith, or other fairness concerns.119 The law holds that even a reciprocal promise voidable for these reasons is consideration, however. For purposes of the mutuality of obligation doctrine, if merely these concerns are at issue the law may as well hold also to be consideration the promise to perform a prior duty.120

The negative, strong form of the mutuality of obligation doctrine thus appears to be dead.121 The Restatement (Second) in general concurs. "The fact that a rule of law renders a promise voidable or unenforceable does not prevent it from being consideration."122 Courts and

118. See id. at 295.
119. See, e.g., Patterson, supra note 2, at 936-38 (listing duress, coercion, deception, or lack of good faith, breach of public policy); Wessman, Consideration II, supra note 2, at 748 (listing duress and other overlapping doctrines).
120. Ward v. Goodrich, 82 P. 701 (Colo. 1905), appears to hold as much but gives no explanation that this is what it is doing. In Ward, the husband, Ward, was bound by court order to pay to wife, Goodrich, $8 per week in child and spousal support. By agreement, Ward promised to pay Goodrich $200 in cash immediately and $2.50 per week thereafter until the child reached age 15. In return, Goodrich promised to drop her action for support and maintenance. After the agreement was signed, Goodrich did drop her support suit, and Ward paid $200 in cash and began to pay the $2.50 per week, which he continued to pay for more than two years before defaulting. Goodrich sued Ward for breach, and Ward's counsel argued the same argument raised in Hay: that 1) Ward's promise was not consideration for Goodrich's promise, 2) Goodrich's promise was therefore not enforceable, and 3) Ward's promise was therefore not enforceable either. The court said:

While it is settled that the promising to do, or the doing of, that which the promisor is already legally bound to do, does not, as a rule, constitute consideration for a reciprocal promise, or support a reciprocal undertaking given by the promisee, it by no means follows that such promise may not be enforced against such promisor by the promisee, although its enforcement compels the performance of that which was already a legal obligation.

Id. at 702. The court agreed with the rule stated in the Hay dicta "as a rule" but enforced the promise anyway, without explaining why. The purpose of the rule that a prior legal obligation is not consideration is commonly said to be prevention of duress. Perhaps the Ward court analogized this case to a case of duress, in which the voidability of the promise provides good reason for enforcing only one of two mutual promises.

122. Restatement (Second) of Contracts § 78 (1981).
commentators, reading the doctrine only in its negative, strong form as did Wray and Ayloffe in Butterye, have said that, as a result, the mutuality of obligation doctrine itself has not fared well. "Exceptions" to the rule have swallowed it up, they say. The Restatement (Second) agrees in this assessment. It states that "mutuality of obligation" means at most only the illusory promise rule. Perhaps these comments have prompted some courts to say that the Restatement (Second) has rejected the mutuality of obligation doctrine. I suggest that the mutuality of obligation doctrine is alive and well, however. Moreover, I suggest that the doctrine not be rejected or overruled, because the doctrine still serves a vital function and because, if it is properly understood, no good reason exists to overrule it.

C. Why the Mutuality of Obligation Doctrine Remains Vital: Affirmative Mutuality of Obligation

That the negative, strong form version of the mutuality of obligation doctrine has been rejected does not mean that the doctrine itself should be abandoned. An affirmative, weak form of the doctrine survives. In fact, lawyers are so accustomed to its role that they routinely assume its function. Perhaps no commentator has discussed this version of mutuality of obligation before because they assumed that the mutuality of obligation or remedies doctrine was a justification for the mutual promise rule. They have argued that a promise's binding nature is what gave it value and justified its status as consideration. Please set that idea aside as you read the following. Instead, assume that even non-binding promises are consideration. That is what the judges did in enforcing wagers as mutual promises in assumpsit. Enforcing wagers as mutual promises in assumpsit requires logically that one accept promises themselves—not their binding nature or their later performance—as consideration, because in the end only one person will pay. Once we assume the mutual promise rule works

123. See Oliphant, supra note 1, 28 COLUM. L. REV. at 1012-13; see also Grover C. Grismore, Principles of the Law of Contracts § 68 (1947); Eisenberg, Probability & Chance, supra note 2, at 1013 ("[T]he doctrine is, for practical purposes, largely a nom de plume for the illusory promise rule.") (implying that if the mutuality of obligation doctrine has no consideration-destroying function, it has no function at all).


125. See, e.g., Doctor's Assocs., Inc. v. Bickel, 66 F.3d 438, 451 (2d Cir. 1995) (stating that "mutuality of obligation" has been largely rejected as a general principle in contract law, and citing the Restatement (Second)); Design Benefit Plans, Inc. v. Enright, 940 F. Supp. 200, 205 (N.D. Ill. 1996) ("[T]he Restatement (Second) of Contracts . . . rejects . . . the doctrine of mutuality of obligation . . . .").

126. See, e.g., Oliphant, supra note 1, 25 COLUM. L. REV. at 720.

127. See supra note 85.
whether or not the reciprocal promise is binding, the necessity for the affirmative mutuality of obligation doctrine becomes apparent.

For example, suppose A and B exchange promises (mutually consenting in the process). Now suppose the law enforces A's promise on the ground that it was given in exchange for B's promise. Once the law has done so, the policy that the law must treat parties equally, absent good reason to do otherwise, requires the mutuality of obligation—or remedies—doctrine. Does the law have any reason not to enforce B's promise also, which was given in exchange for A's? No reason exists a priori for not enforcing both. On each side of the transaction, the facts, or at least the categories into which facts are grouped by the law, are the same. The result is that the law must presumptively enforce both promises if it decides to enforce one of them. To treat the parties equally, the law must offer the same remedies to both parties initially. This is the meaning of "both must be bound or neither should be." Fairness and equality under the law demand that this proverb be a corollary—in this affirmative, remedy-impling form—to the mutual promise rule. Later, or more particular, facts might show that some remedies or even enforcement itself of one promise is inappropriate, but absent such facts the law to be fair must presume "equal remedies" on both sides. In the twentieth century, perhaps this may seem too obvious to state.

But what seems obvious now was not so in the late sixteenth century. A review of sixteenth century assumpsit procedure illustrates particularly why this rule of abstract justice may have been stated so often. Procedures in mutual promise cases were much simpler than now. The plaintiff would plead before the King's Bench or Common Pleas, generally. Only three elements were necessary: a promise, consideration, and breach.128 In the sixteenth century no requirement of assent existed.129 No reified "contract" was pleaded or shown to exist. Only one party's promise, the defendant's, was at issue in the case. The defendant would plead in response.130 If factual issues remained, the lawyers would take the case to a jury. If the plaintiff won the trial, then the defense might come back to the King's Bench or Common Pleas to complain of legal errors.131 Lack of sufficient consideration was a common objection after trial.

128. "In every action upon the case upon a promise, there are three things considerable, consideration, promise and breach of promise ... " Golding's Case, 2 Leon. 72, 74 Eng. Rep. 367, 367 (1686) (Egerton for the defendant); see Simpson, supra note 8, at 574-75, 580-82.

129. See, e.g., Simpson, supra note 8, at 407.

130. The defendant might deny any particular fact, or all of the plaintiff's case, or raise a legal issue, or admit facts and assert others. See generally Baker, English Legal History, supra note 8, at 90-107; Simpson, supra note 8, at 578-79.

131. This might be done most commonly by a motion in arrest of judgment, or in limited instances by a motion for a new trial. See Baker, English Legal History,
Now say you are sitting on the King's Bench reviewing one of these objections. The defendant's promise has been tried, not the plaintiff's. When the defendant objects that there is no consideration alleged on which his promise was made, what is a judge to do? The courts held that the plaintiff's promise was consideration for the defendant's. Having decided that, the courts must have seen immediately that the defendant's promise had simultaneously become consideration for the plaintiff's promise.\textsuperscript{1} That meant that the defendant in a suit against the plaintiff could satisfy two elements: promise and consideration, and this was necessarily so, because the plaintiff could not obtain a verdict against the defendant if it were otherwise. The law must, in order to treat the parties equally, have admitted that the defendant would likewise have a remedy, or at least an equal chance at one, against the plaintiff.

At this stage of litigation between the parties, whether the defendant actually had a remedy against the plaintiff was almost always abstract, and necessarily so. Except in the rare case in which the plaintiff appeared to have a clear legal defense, such as the non-occurrence of a condition as in Butterye or perhaps the plaintiff's infancy as in Forrester's Case,\textsuperscript{2} no way existed to say whether the defendant could actually enforce the plaintiff's promise. No way existed to tell whether the defendant had actually sued (or could actually sue) the plaintiff in a countersuit. Finally, the plaintiff in a mutual promise case did not even have to allege or show whether she had or had not performed her promise.\textsuperscript{3} Thus, it is possible in some cases that the mutuality of remedies doctrine was recited even though the plaintiff had already performed. (In such cases the rule's application must have seemed odd to defendants who had already recovered or to plaintiffs when the court hinted that they might be sued on a promise already fulfilled.) If the plaintiff had not yet performed, the rule would

\textsuperscript{1} supra note 8, at 98. Arrest of judgment was the method employed in Fuller's Case, for example. See supra text accompanying notes 73-77.

\textsuperscript{2} In fact, the royal courts required that the promises be given simultaneously. See Nichols v. Raynbred, Hob. 88, 80 Eng. Rep. 238 (1615) ("Note here the promises must be at one instant, for else they will be both nuda pacta."); Jenk. 296, 145 Eng. Rep. 215, 216 (1615) ("[S]uch mutual assumpsits ought to be made at the same time; for they make the consideration, and the consideration and the promise always ought to be together: otherwise it is nudum pactum.").

\textsuperscript{3} 1 Sid. 41, 82 Eng. Rep. 958 (1661); see supra note 105 for a discussion of Forrester's Case.

\textsuperscript{4} See Gower v. Capper, Cro. Eliz. 543, 78 Eng. Rep. 790 (K.B. 1596) ("[T]he alleging that he had delivered the bill was but surplusage; for the consideration was the promise to deliver it; and therefore he needed not have alleged that he delivered it. But a promise against a promise is a sufficient ground for an action."); see also Bennett v. Astell, 1 Lev. 20, 83 Eng. Rep. 276 (1660); Hurtleton v. Webb, Benloe 160, 73 Eng. Rep. 1003 (1626); Lampleigh v. Brathwait, Hobart 105, 80 Eng. Rep. 255 (1616); Ibbetson, supra note 8, at 85 n.100.
have given defendants cold comfort at best, because to win on such a suit the defendant may have had to subject himself to a jury trial and collection procedures. In this procedural posture, the mutuality of remedies doctrine amounts to little more than a recognition that the elements for a suit against the plaintiff appear in the abstract to exist and a recommendation that both sides of a business transaction should be enforceable equally, rather than only one—that both should be enforced, or neither. The judges appear to have been saying, "well, if we are going to give a recovery to the plaintiff, then we had better tell the defendant he has the same chance." The mutuality of remedies or obligation doctrine thus did not require that the counter-promise actually be enforceable but only that the law make available to the defendant the same chance at recovery that the plaintiff had against the defendant. The rule would have nearly always been affirmative in meaning as used in this procedural context.

In fact, the most famous mutuality of obligation case, the one Wiliston pegged as the mutuality doctrine's creator, Harrison v. Cage, used the mutuality of obligation doctrine only affirmatively! Harrison, a man, promised to marry Cage. Cage, in return, promised to marry Harrison. But Cage married another instead, so Harrison sued Cage for breach of promise. Before the King's Bench, Cage's counsel made a fateful error. He argued that a woman is not liable for breach of promise to marry but admitted that a man may be. Holt, C.J., lit on this admission to explain why Harrison could recover. The action of a woman against a man for breach of promise to marry was and is based on the mutual promise rule, Holt explained. Because the woman stands in no different position than does the man, the mutuality of obligation doctrine must also apply: "Either all is a nudum pactum, or else the one promise is as good as the other." Therefore, Holt held Harrison the man had as good a remedy as did

135. For an argument assuming some hardship on defendant's part on being "driven to his cross action" on mutual promises, see Peters v. Opie, 1 Vent. 177, 214, 86 Eng. Rep. 120, 144, 2 Keble 837, 84 Eng. Rep. 529, 3 Keble 45, 84 Eng. Rep. 586 (1672) ("Hale Chief Justice said he never allowed a reciprocal promise, where the intent appears the work should be done before the mony paid, else a man might be forced to pay and sue a beggar.").

136. See supra notes 16-17 and accompanying text.

137. 5 Mod. 411, 87 Eng. Rep. 736 (1698).

138. John Holt (1642-1710) was the son of a barrister and sergeant-at-law. Holt was admitted to Gray's Inn at age 9. He entered Oxford at 15 but never earned his degree. He was instead called to the bar at 21. Holt was elected an "ancient" of Gray's Inn at 32. He once resigned from a semi-judicial office upon refusing to pass a sentence of death on a deserter from the army. After taking part in a number of prominent trials, Holt was appointed Chief Justice of the King's Bench in 1689, at age 46, and served for 20 years. A number of Holt's decisions remain influential in contract, bailment, and commercial law.

139. See Harrison, 5 Mod. at 412, 87 Eng. Rep. at 737.

140. Id.
Cage the woman. The mutuality of obligation doctrine did not negate a promise as consideration but required a mutual remedy! This affirmative mutuality of obligation doctrine was not inevitable. (Edwin Patterson rightly concluded that mutuality of obligation "is not strictly part of the bargain concept." The common law was long concerned with the notion that a business transaction should be actionable by both parties, but it never held such equality of remedies to be a foregone conclusion. The question did not arise often, because most transactions reached the courts only after they were half-executed. In a half-executed transaction, the question is moot: If a benefit is already conferred on the defendant or a detriment suffered by the plaintiff, the defendant has performance itself and does not need an equal remedy against the plaintiff. In such cases equality demands only that the plaintiff alone be given a chance at her part of the bargain.

But when the common law enforced one of two mutual and executory promises, the judges appeared to feel a necessity to declare that the other promise was at least potentially enforceable. Long before working out liability for breach of promise in assumpsit in the mid to late sixteenth century, judges discussing wholly executory sales agreements often felt the need to clarify that both sides were enforceable by some writ or another. The judges often buttressed this result by

141. You agree a woman shall have an action; now what is the consideration of a man's promise? Why, it is the woman's. Then why should not his promise be a good consideration for her promise, as well as her promise is a good consideration for his? There is the same parity of reason in the one case as there is in the other, and the consideration is mutual. Id.

142. Patterson, supra note 2, at 939.

143. See, e.g., Anon., 1 Dyer 29b, 30a, 73 Eng. Rep. 65, 66 (1537): And this diversity was taken, when the day of payment is limited, and when not: in the first case, the contract is good immediately, and an action lies upon it without payment; but in the other not so: as if a man buy of a draper twenty yards of cloth, the bargain is void, if he do not pay the money at the price agreed upon immediately; but if the day of payment be appointed by agreement of the parties, in that case, one shall have his action of debt, the other an action of detinue. See also Orwell v. Mortoff (1505), reprinted in Baker & Milsom, Sources, supra note 8, at 406, 409 (Kingsmill, J.) ("Every bargain shall be interpreted equally as between the parties, and not more in favour of one than the other."); Anon., C.H.S. Fifoot, History and Sources of The Common Laws 252 (1949) (1478) (Catesby arguing for the defendant: "[I]n every such bargain the law assumes that, as the one puts his trust in the other to have the thing for which they have bargained, so ought the other e contra."); Anon., Baker & Milsom, Sources, supra note 8, at 236, 236 (1458) (Pryst, J.) (listing some exceptions to a mutuality of remedies policy: "For instance, if a man buys a cow or a horse from me for 20s., I shall have a good action of debt against him by reason of the sale; and yet it is possible that the buyer had no quid pro quo, for it may be that I have no horse . . . . If, however, I do have a horse, he may take it out of my possession by virtue of the sale."); Doige's Case (1442), reprinted in Baker & Milsom, Sources,
claiming that property (or property rights) passed at the time of the bargain and sale, even though neither party had yet performed.144 Each promisee gained a property right in the thing the other party had promised to exchange. If the property of each promisor passed at the time of the sale, then before either had performed each promisee had an action against the other to obtain its property. Each promisee had a property-based and therefore an “equal” remedy against the other, equal at least in an abstract sense.145

West v. Stowell146 (1577), the first reported case to recite the mutual promise rule, ties the mutual promise rule both to the mutuality of remedies doctrine and this property passing rationale. Mounson, J., in response to an objection that no reciprocal remedy exists, argues by analogy from a gambling case: “A cast at dice alters the property, if the dice be not false; wherefore then is there not here a reciprocal action?”147 In other words, Mounson might say, mutual promises give

\[\text{supra note 8, at 390, 394, quoted infra in judges' discussion notes 150-51 and accompanying text; Anthony Fitzherbert, The New Natura Brevis 286 (1652 English ed., original published in 1534 in Law French) (discussing debt for both sides of a sales contract at once, in the debet and detinet for money and in the detinet only for "20 quarters of wheat, or a horse").} \]

144. The view that bargains or sales of goods are actionable on each side before money or goods change hands is consistent with the notion that property passes at the time of the sale. See, e.g., Tailboys v. Sherman (1443), reprinted in Baker & Milsom, Sources, supra note 8, at 395, 396 (“As soon as the bargain was made, the property was in the plaintiff . . . .”); David Ibbetson, From Property to Contract: The Transformation of Sale in the Middle Ages, 13 J. Legal Hist. 1 (1992) [hereinafter Ibbetson, Transformation]; David Ibbetson, Sale of Goods in the Fourteenth Century, 107 L.Q.R. 480, 490-99 (1991) [hereinafter Ibbetson, Fourteenth]; S.F.C. Milsom, Sale of Goods in the Fifteenth Century, 77 L.Q.R. 257, 271-72, 274-76, 282-84 (1961) [hereinafter Milsom, Sale of Goods].

145. Milsom speculates that the property rationale may have come about “precisely because a difficulty was suddenly felt about executory contracts” or because of difficulties perceived in the action of detinue. Milsom, Sale of Goods, supra note 144, at 273-75, 283. Ibbetson agrees that the property doctrine fits well with the notion that both sides of an entirely executory bargain were actionable, and explains these ideas in much greater detail. See Ibbetson, Transformation, supra note 144, at 12-13 (noting that in England, where the property theory was retained, practices did not differ much from elsewhere in Europe where the property theory was laid aside); Ibbetson, Fourteenth, supra note 144, at 490-99.


147. Id., 2 Leon at 154, 74 Eng. Rep. at 438, reprinted in Baker & Milsom, Sources, supra note 8, at 495. Mounson’s entire position in the case responds to defense counsel’s primary objection: “[T]hat here is not any sufficient consideration; for the promise of the plaintiff to the defendant, non parit actionem, for there is not any consideration upon which it is conceived, but is only, nudum pactum, upon which the defendant could not have an action against the plaintiff.” Id., 2 Leon at 154, 74 Eng. Rep. at 437, reprinted in Baker & Milsom, Sources, supra note 8, at 495 (emphasis added). Manwood’s response also discussed property-based reasoning: “At dice the parties set down their monies, and speak words which do amount to a conditional gift; (scil.) if that the other party cast such a cast he shall
each promisee a property right in the reciprocal promisor’s wagered item, so that each promisee has a remedy against the other. In citing the property rule, Mounsen implies that the problem in the mutual promise case was similar to that in the executory bargain and sale cases, or at least to a property-based law of gaming.

Occasionally common lawyers enforced one side of a business transaction but not the other. These instances are scattered throughout history and the yearbooks, but were known and adhered to by later generations. Consider Pryso’s dicta in Anon.:

But in some cases I have a good action of debt against a man because of a sale, and I shall have the thing sold, and yet he shall not take it by reason of the sale. For instance, if I sell a man the manor of Dale (whereof I am seised) for £100, I shall have a good action of debt against him on the contract; and yet the property of the manor is not in the purchaser by this contract, and he may not enter into the manor by virtue of this sale without livery and seisin. Moreover, I shall have a good action of debt even if I have no manor; but that is because of the contract. 148

Thus, sometimes remedies were not reciprocal and equal; in such cases no affirmative presumption of mutual remedies operated, because the facts necessary for enforcement, or at least the legal categories into which facts were placed, were not the same on both sides. 149 In Pryso’s dicta, the seller’s remedy at the time was an action on a contract but the buyer’s remedy was an action for the land. If the seller had no land, the buyer could never obtain the land, on the contract or otherwise. The law simply gave the buyer no remedy.

But judges avoided this result if they could. Though the purchaser of land might have no mutual remedy in 1458 if the seller had no land, if the seller initially had land but after entering into the contract conveyed to someone other than the purchaser, the purchaser might sue in assumpsit for deceit. A primary argument for this rule, laid down in Doig’s Case 150 (1442), was that otherwise the remedies would not be equal. In now rather well-known language, Justice Newton argued, “It would be amazing law, then, if there should be a perfect bargain under which one party [the buyer] would be bound by an action of debt but would be without remedy against the other.” 151

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149. See also, e.g., Ibbetson, Fourteenth, supra note 144, at 493, 499.
150. Shepton (or Shipton) v. Dogge (Doig’s Case) (1442), reprinted in Baker & Mil- som, Sources, supra note 8, at 390.
151. Id. at 393 (1442). In Doig’s Case the seller of land had promised informally to convey but then conveyed to another. Conversation continues in response to Newton’s comment: Fortescue: If the case put by Newton be law, then there is no question concerning the law in our case: for if each party to a bargain should be bound by an action, it must follow that this action of deceit is maintainable.
Common lawyers of the late sixteenth century also recognized the need for equal remedies in business dealings. Consider, for instance, Ward v. Grimwise.\textsuperscript{152} In Ward, the defendant promised to pay the debt of his father if the plaintiff would not sue the father. But the plaintiff made no explicit promise not to sue the father. When the plaintiff sued the defendant in assumpsit and won, the defendant objected to the Court of Common Pleas that "here there was not any express mutual agreement because the plaintiff did not undertake directly that he would not sue [my] father."\textsuperscript{153} The defendant was afraid that only he was bound to his guarantee, that the plaintiff might recover from the defendant and then sue the father, anyway. But the court apparently understood that serious parties would not agree to such a thing. Rather than let the defendant off, the court inferred or implied by law the mutual remedy: "[T]he acceptance [by the plaintiff] of the [defendant's] undertaking implies a certain contract and assumpsit on behalf of the plaintiff that he not prosecute" the father.\textsuperscript{154} The court would rather supply a reciprocal or mutual remedy than let a serious agreement go unenforced.

Thus, the existence of a mutual remedy remained a goal, at least in the abstract, for executory agreements.\textsuperscript{155} The law regarding mutual promises would be amazing law, would it not, if there should be a perfect bargain and only one of the two parties could recover? To be fair, the law must make available to both parties the same access to the courts. Baker concludes that one "spiritual source[] of the law of consideration" was the "simple, timeless, and ubiquitous moral principle[] that bargains should bind both parties."\textsuperscript{156} Application of the affirmative mutuality of remedies doctrine allowed courts to think of
mutual promises as formally equal on both sides, which is how sixteenth century courts viewed mutual agreements and how transacting parties saw themselves. The mutuality of obligation or remedies doctrine was a necessary and logical step on the road to seeing mutual promises as enforceable bargains at all.\footnote{157}

This discussion also suggests a second, related purpose for the mutuality of remedies doctrine. In \textit{Ward}, the court talked as if the plaintiff's acceptance of the defendant's promise created a contract, with a mutual obligation.\footnote{158} The theory behind this holding may have been similar to an argument made in \textit{Reniger v. Fogossa}:

[An agreement concerning personal things is a mutual assent of the parties, and ought to be executed with a recompence, or else ought to be so certain and sufficient, as to give an action or other remedy for a recompence: and if it is not so, then it shall \textit{not} be called an agreement, but rather a nude communication without effect.\footnote{159}]

Other references to mutual assumpsits as mutual agreements or contracts exist from this time period in reports of common law decisions.\footnote{160} Civilians at this time considered contracts to be firmly

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\footnote{157. I am suggesting only that the mutual promise rule could not have applied fairly unless the defendant was given an equal chance at recovering from the plaintiff, not that a counter-promise could not have been valuable and therefore worth bargaining for unless it was enforceable. Ibbetson claims this latter theory in his argument that the primary theory underlying the early consideration doctrine was reciprocity:

At first sight the cases of mutual promises are hard to fit into a doctrine of reciprocity; where promises are actionable independently of each other it might happen that the defendant be held liable notwithstanding that he had not in fact received the substantial benefit that had motivated the making of the promise. So long as the counter-promise was enforceable, though, it could be argued that this in itself was a benefit which the defendant had received: the right to performance, although not as good as actual performance, was itself a thing of value.

Ibbetson, \textit{supra} note 8, at 86. I respond to Ibbetson's suggestion \textit{infra} at text accompanying notes 170-81.

158. \textit{See supra} text accompanying notes 153-54. The note in the margin of the MS 105b, f.23 report of \textit{Ward} says, "Acceptance of the assumpsit makes the contract certain." In this context, "certain" means binding.


161. Coke in \textit{Slade's Case} makes a similar statement: "[T]he mutual executory agreement of both parties imports in itself reciprocal actions upon the case." \textit{Slade's Case}, 4 Co. 92b, 94b, 76 Eng. Rep. 1074, 1077 (1602); Penson v. Higbed, 4 Leon. 99, 74 Eng. Rep. 756 (1590) (Wray, J.) (admitting that a "mutual promise and agreement" "is an assumpsit in law"); II \textit{FULBECK, A PARALLELE, supra} note 155, at 18b. For later statements of the same principal, see Ibbetson, \textit{supra} note 8, at 102-03 (reporting language from \textit{Hurford v. Pile}, Harv. MS 105f f.2911: "[E]very assumpsit is made by the mutual agreement of both parties, and through this creates a contract as in \textit{Slade's Case}, and because of this the person who assumes cannot make a countermand, for a bargain is a bargain . . . ."); Opie v.
grounded in mutual consent. Though the common law assumpsit action determined liability by looking at a defendant's promise and consideration for it, common lawyers seemed willing to claim that they too were, in assumpsit, enforcing contracts and mutual agreements. Contracts are mutual affairs, between two parties. Claiming to enforce contracts through assumpsit is troublesome unless there is some mention of the plaintiff's liability as well (or unless the plaintiff has already performed). The mutuality of obligation doctrine served that purpose. It allowed common lawyers to think of mutual promises in terms of contract.

Now, at the end of the twentieth century, the mutuality of remedies or obligations doctrine in this affirmative form is too fundamental, and perhaps too abstract, to be cited in current litigation, or even thought about much. But it serves the same purposes now as in the sixteenth century. Once a court has found assent and mutual promises, to treat the parties equally and fairly the court should presumably enforce both promises. Perhaps even more strikingly, our law has explicitly adopted the reified contract concept. The very idea of contract may not make sense as applied to mutual promises unless the mutuality of obligation presumption generally holds. Lawyers today would not call a singly enforceable promise a contract, even if it were enforceable because it was given in exchange for another promise. Only when the affirmative mutuality of remedies presumption is added to the mutual promise rule do mutual promises become the presumptively binding agreement we call a contract. Thus, in calling mutual, executory promises a contract, we assume that both should be bound if either is. This is largely what it means for a "contract" to form if that contract is bilateral and executory—with rights and remedies equal on both sides at least in the abstract. As long as consideration remains a requirement of a contract, and mutual promises constitute consideration, the mutual remedies rule must bridge the gap between the mutual promise premise and the contract conclusion.

This necessity of the mutual remedies presumption to the enforcement of wholly executory, mutual promises as contracts means that the affirmative mutuality of obligation doctrine is relied on daily, though its use remains unstated. The mutuality of obligation doctrine operates each time a court finds (or lawyers assume) that both parties

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Peters, 2 Keble 837, 84 Eng. Rep. 529, 530 (1671) (Saunders, for the defendant: "A mutual promise is but the construction of law on a mutual agreement.").

See, e.g., I Fulbeck, A Parallele, supra note 155, at 1; II Fulbeck, A Parallele, supra note 155, at 18a-b.

II Fulbeck, A Parallele, supra note 155, at 186 ("[O]ur Law requireth in all contractes a mutuall consideration"); see supra sources cited in notes 158-61.

See, e.g., John Rastell, Les Terms De La Ley 173 (1527), reprinted with English translation in 1879 (defining contract first as "a bargaine or covenant betweene two parties.").
to a wholly executory contract are bound, rather than only one of them, because mutual promises occurred.\textsuperscript{165}

Common sense and history (though perhaps not strictly the language of judicial opinions) show that this affirmative doctrine has continued to operate only presumptively, as a weak or strong presumption depending on the judge, the times, and the case at hand. If good reason exists to enforce only one promise and not the other, courts depart from the mutuality of obligation doctrine and enforce only one of two mutual promises. Courts have taken this step in the cases commonly called "exceptions" to the mutuality of obligation doctrine. Both parties are bound unless one is an infant or fraud victim, was insane at the time, signed under duress, made a promise unenforceable under the statute of frauds or violative of some other statute or public policy, and so on.\textsuperscript{166} In each of these cases, good reason exists for releasing one party, so the presumptive effect of the mutual obligation doctrine is overcome. The good reason is a defective promise or perhaps the fault of the party who caused the defect, or both. Modern law already talks of binding promises this way, in fact. The Restatement (Second)'s definition of binding promise is presumptive in the very way the mutuality of obligation doctrine requires.\textsuperscript{167}

That the mutuality of obligation doctrine's presumption is overcome does not destroy its initial force, however. These so-called "exceptions" to the presumption actually confirm it. Parties are mutually bound to a wholly executory agreement in the first place in part because the court can not rationally choose between the parties on the

\textsuperscript{165} Edwin Patterson hinted at something like the function of mutuality of obligation described here in his 1958 article, An Apology for Consideration. Patterson said, "The term 'mutuality' has commonly been applied to the exchange of a promise for a promise, and means no more than the sufficiency of the proof of promise for promise in a bilateral contract." Patterson, supra note 2, at 940. Patterson mistakenly trivialized the affirmative mutuality of obligation doctrine by assuming its existence in a "bilateral contract," however. A bilateral contract was impossible without application of the rule in the first instance.

\textsuperscript{166} See supra text accompanying notes 104-120.

\textsuperscript{167} The Restatement (Second) of Contracts defines "Binding Promise" as:

A promise which is a contract is said to be "binding." As the term "contract" is defined, a statement that a promise is binding does not necessarily mean that any particular remedy is available in the event of breach, or indeed that any remedy is available. Because of the limitations inherent in stating or illustrating rules for the legal relations resulting from promises, it frequently becomes necessary to indicate that a legal duty to perform arises from the facts stated, assuming the absence of other facts. In order to avoid the connotation that the duty stated exists under all circumstances, the word "binding" or a statement that the promisor is "bound" is used to indicate that the duty arises if the promisor has full capacity, if there is no illegality or fraud in the transaction, if the duty has not been discharged, and if there are no other similar facts which would defeat the prima facie duty which is stated.

Restatement (Second) of Contracts § 1 cmt. g (1981).
basis of legal categories the court has used to analyze the transaction. Thus, when a so-called “exception” applies, that one party remains liable confirms the mutual remedies presumption in its foundational form even though the rule is no longer applicable in that case to both parties. Most commentators have assumed that only declaring the entire contract void would uphold the mutuality of obligation doctrine. They are correct only if the negative, strong form is the only version of the rule. But the affirmative, presumptive version of mutuality of obligation operates prior logically to such “exceptions” and continues to operate whether the entire contract is declared void or only one party continues to be bound. So the “exceptions” shed no light on the continuing vitality of the rule. Even though one party is not bound, the other is still bound on a “contract.” The true test of the mutuality of obligation presumption’s vitality would come only if a court held as a general matter that only one of the two parties is bound in every wholly executory contract, regardless of whether one promise is void or unenforceable.168 This is not likely to occur.169

I am not suggesting that this view of the mutuality of obligation or remedies doctrine is “the original understanding.” I doubt there was any clear understanding. Recall that in 1583 two King’s Bench judges were willing to strike down a wager-like contract in Butterye because only one party could win the wager and thus only one and not both

168. This paragraph responds to those who have argued that the mutuality of obligation doctrine has been swallowed up by its exceptions. See Oliphant, supra note 1, 28 COLUM. L. REV., at 1013; cf. Eisenberg, Probability & Chance, supra note 2, at 1013 (“Once all the necessary qualifications [including that avoidance of or refusal to enforce one promise does not preclude enforcement of the other] to the mutuality doctrine have been made, the doctrine is, for practical purposes, largely a nom de plume for the illusory promise rule.”).

169. I wonder why Oliphant, Williston and Corbin never thought of this, particularly because Williston and Corbin were willing to argue for the doctrine and Williston cited as the source of the rule Harrison v. Cage, 5 Mod. 411, 87 Eng. Rep. 736 (1698), in which the doctrine was used affirmatively. See supra notes 17, 136-41 and accompanying text. Perhaps it is because they all agreed that any answer to the vitality of the mutuality of obligation rules should come from current case law, which failed to see the mutuality of obligation doctrine as an affirmative rule, or as only a presumption. See generally WILLISTON, supra note 9, at 857-59; Oliphant, supra note 1, 28 COLUM. L. REV., at 997-98 n.2; Corbin, supra note 12, at 551 (“It can be established only by a collection of decisions in point . . . .”). Few if any of the decisions establishing the mutuality of obligation doctrine were available or well known when these three authorities wrote. Perhaps also they were far too practical to think of such a pedantic idea as I am suggesting. (As a boy, I used to move a 10 foot-high pile of sand from place to place in the backyard using only a pair of tweezers.) Oliphant asked, however, “Is there some well established ‘principle’ in the law of contracts from which the supposed general [mutuality of obligation] rule, that both parties must be bound, follows as a matter of logical necessity?” See Oliphant, supra note 1, 25 COLUM. L. REV., at 707. I am answering yes to Oliphant. The principles are the mutual promise rule, basic fairness, and the meaning of contract.
parties could have a remedy against the other.\textsuperscript{170} These judges thought that the absence of a mutual remedy meant that the counter-promise was not a recompense and therefore not consideration. Ibbetson, in arguing that the theory behind the consideration doctrine centered around reciprocity and exchange, suggests that these judges understood the rule correctly, that the negative, strong form of the mutuality of remedies doctrine actually was intended to justify the mutual promise rule.\textsuperscript{171}

The negative, strong form mutuality of remedies doctrine does suggest a tie to the reciprocity idea so prevalent in assumpsit rules, and many judges probably understood the rule as Ibbetson suggests. But this approach as a historical matter leaves several questions unanswered. First, justifying the mutual promise rule by a reciprocal remedy is a circular argument: a counter-promise makes a promise enforceable only because the counter-promise itself is enforceable, but the counter-promise is enforceable only if the promise is enforceable, and so on. This dilemma stumped Holmes, who concluded that “it is a case of jumping in—call one binding and both are.”\textsuperscript{172} Yet we have no notice of anyone’s recognizing this difficulty at the time the rule was formulated. Perhaps they didn’t see the problem because they didn’t understand the rule the way Holmes did.

Moreover, cases in assumpsit were brought on mutual promises long before anyone heard of the mutual promise rule, as early as 1518.\textsuperscript{173} And some judges who were intimately familiar with the mutuality of remedies or obligation doctrine, such as Gawdy, didn’t think it affected enforceability in cases like Butterye. Recall that West v. Stowell\textsuperscript{174} (1578), perhaps the first discussion of the mutual promise

\textsuperscript{170} See supra text accompanying notes 79-85; see also Periam’s comments in Fuller’s Case, supra text accompanying note 75.

\textsuperscript{171} Ibbetson argues that the theory underlying enforcement of promises in assumpsit was “a bargain model of contract” in which the parties reciprocally traded valuable considerations. He sees the mutuality of remedies doctrine as tying the mutual promise rule to this underlying theory of enforcement:

\begin{quote}
So long as the counter-promise was enforceable, . . . it could be argued that this in itself was a benefit which the defendant had received: the right to performance, although not as good as actual performance, was itself a thing of value.
\end{quote}

Ibbetson, supra note 8, at 86.


\textsuperscript{173} See Ibbetson, supra note 8, at 85. No mention of the mutuality of obligation doctrine occurs in Lucy v. Walwyn, see Baker & Milsom, Sources, supra note 8, at 485, or the Inner Temple Moot from Gell’s reports, which discusses a case of mutual promises, see id. at 487, or in the arguments in Sharington v. Strotton, 1 Plowden 298, 75 Eng. Rep. 454 (K.B. 1566), reprinted in Baker & Milsom, Sources, supra note 8, at 488, which discuss much of the other consideration doctrine of the time.

\textsuperscript{174} 2 Leon. 154, 74 Eng. Rep. 437 (C.P. 1577).
rule in a case report, centered around the meaning of the mutuality of remedies or obligation rule.175 The early cases thus shed little light on what the rule means.176 Probably few lawyers were sure.177 Even Ibbetson admits that, if Wray and Ayloffe understood the rule correctly, the courts as early as Bettisworth (1608) began to abandon that understanding in favor of "a view that the substance of the consideration was to be found in the promise itself; so long as the promise was of some value at the time of the initial agreement it was irrelevant that it was not enforceable at the time of the action."178 The courts reverted to Wray and Ayloffe's position many times thereafter, however.179

One should not be surprised if no one was sure what the rule meant. The consideration rules were just becoming doctrine as a result of various pleading practices and discussions which occurred in the fifty or so years beforehand.180 Baker calls consideration's genesis "the conversion of loose words into jargon."181 Most likely the mutuality of obligation doctrine as first understood was necessary in the sense that I have explained it is still necessary, but just how little else it means has taken 400 years to explicate or decide.

I am suggesting that the mutuality of obligation doctrine is not an explanation or justification for the mutual promise rule. But mutuality is necessary in the abstract, assuming the existence of the mutual promise rule, to the mutual promise rule's fair operation and to our thinking of mutual promises as contracts. Rational (and debatable) justifications for the mutual promise rule might include an argument from autonomy,182 or that the rule works to make economic efficiency more likely183 (though empirical support for this second argument ap-

175. See supra notes 66, 90-93, 146-47 and accompanying text.
176. See supra Part III.A.
177. See Baker, Legal Profession, supra note 8, at 383 ("[T]he opinions of such distinguished lawyers as Plowden, Keilwey, and Wray, in the third quarter of the [16th] century, are enough to show that the difficulties then were serious. When general statements about the effectiveness of mutual promises began to appear in the books, the explanation of their efficacy was that there were reciprocal remedies. The constant repetition of that proposition in the reports indicates in itself that it was not altogether digestible."). I suggest the constant repetition arose from lack of clarity about what the rule meant, not dissatisfaction with the rule's theory.
178. Ibbetson, supra note 8, at 88.
180. See Baker, Legal Profession, supra note 8, at 369-91; Simpson, supra note 8, at 316-488.
181. Baker, Legal Profession, supra note 8, at 391.
182. See Charles Fried, Contract as Promise 7-27 (1981); Howard Engelskirchen, Consideration as the Commitment to Relinquish Autonomy, 27 Seton Hall L. Rev. 490 (1997).
pears necessary). A mutual promise gives a promisee nothing more than mere words or moral obligation or perhaps culture-caused expectation or trust—loose justification, perhaps, for saying that by law mutual promises bind. The argument that the mutual promise binds the promisor because the counter-promise gives the promisor a reciprocal action against the promisee is hopelessly circular, as Holmes said. As a justification for the mutual promise rule, the notion that the promise if performed would be consideration is likewise circular. But if, despite these paradoxes, the law accepts mutual promises as consideration, the mutuality of obligation doctrine, at least in its affirmative, presumptive form, must come with it.

13 (1962): "The possibility of coordination through voluntary cooperation rests on the elementary—yet frequently denied—proposition that both parties to an economic transaction benefit from it, provided the transaction is bilaterally voluntary and informed."

184. The argument from custom has some historical support. St. Germain held that contract law followed the Jus gentium. See St. GERMAIN'S DOCTOR AND STUDENT 133-35, 228 (91 Selden Society, T.F.T. Plucknett & J.L. Barton eds. 1974) (Student: "Fyrst it is to be understande that contractes be grounded vpon a custome of the realme and by the lawe that is called Jus gencium and not dyrectly by the lawe of reason."). Various historical evidence indicates that mutual informal promises were enforceable in the Chancery, see T.B. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 16 (Octagon 1974) (1914); at canon law, see R.H. Helmholz, Assumpsit and Fidei Laesio, in CANON LAW AND THE LAW OF ENGLAND 263-90 (1987); and in the borough, fair, and other mercantile courts, see BAKER, The Law Merchant and the Common Law Before 1700, in BAKER, LEGAL PROFESSION, supra note 8, at 341; 1 BOROUGH CUSTOMS 207-14 (18 Selden Society, Mary Bateson ed. 1904); 2 BOROUGH CUSTOMS lxxix-lxxxii (21 Selden Society, Mary Bateson ed. 1906). These sources indicate that promising parties were used to the idea that informal promises were in many circumstances enforceable. After the ecclesiastical courts declined during the reign of Henry VIII and inflation preempted some local court jurisdictional rules at about the same time, it would have been natural for plaintiffs to try to bring such cases to the king’s courts. See, e.g., S.F.C. Milson, HISTORICAL FOUNDATION OF THE COMMON LAW 315, 333 (2d ed. 1981). Moreover, an increase in the social importance of credit, caused by the rapidly expanding economy of the late 16th century, pushed royal courts to take a more active role. See CRAIG MULDREW, THE ECONOMY OF OBLIGATION (1998).

185. Cf. Wichals v. Johns, Cro. Eliz. 703, 78 Eng. Rep. 938 (K.B. 1599) (noting while enforcing mutual promises that not only does the defendant have a cross-action against the plaintiff but “also the defendant shall be charged as to” the plaintiff, presumably referring to the defendant’s payment to the plaintiff of the judgment against him that the court proposed to enter in Wichals). No guarantee exists that any performance will occur. Moreover, the law enforces the promise even though no performance occurs on either side. Assuming that a performance will occur from the mere fact of promise is thus no less circular than assuming that the law will supply an action.
IV. WHY MUTUALITY OF OBLIGATION HAS NOTHING TO DO WITH VALUE

The relationship between value and mutuality of obligation impacts two kinds of discussion. First, it impacts discussion by reformers who recently have called for the doctrine of consideration to be abolished. Part A below relates how these reformers have rallied around ideologies underlying the so-called "bargain principle" of consideration. These ideologies suggest that the law should not second-guess economic actors' attempts to promise wisely. The law has for 400 years required some judicial second-guessing, because the consideration doctrine requires an actual exchange of a promise for some other mutual promise or performance. These reformers would have the law drop the exchange requirement. In conjunction, these reformers have suggested that the mutuality of obligation doctrine be dropped. This article's position with respect to mutuality of obligation is consistent with these reformers' proposals. If the law no longer requires a mutual promise, the need for mutuality of obligation doctrine, in either negative or affirmative form, will disappear.

Second, the myth that mutuality of obligation is merely an inquiry into the value or adequacy of consideration has been used as an argument for abolishing the mutuality of obligation doctrine in a few courts. The *Restatement (Second)* also cites that argument in support of its conclusion that mutuality of obligation has been abolished, and a few courts have listed the *Restatement (Second)* argument as authoritative. Part B concludes that only the negative version of the mutuality of obligation doctrine requires an inquiry into adequacy of consideration. No relationship exists between adequacy or value of consideration and the affirmative, presumptive mutuality of obligation doctrine this paper advocates. This paper therefore suggests that these courts and the *Restatement (Second)* erroneously discard the mutuality of obligation doctrine.

A. Consideration Reform and Mutuality of Obligation

The idea that courts should not question contracting parties' subjective determination of the value of consideration is not a new princi-


187. See, e.g., Doctor's Assocs., Inc. v. Distajo, 66 F.3d 438, 451 (2d Cir. 1995) (stating that "mutuality of obligation" has been largely rejected as a general principle in contract law, and citing the *Restatement (Second)*); Design Benefit Plans, Inc. v. Enright, 940 F. Supp. 200, 205 (N.D. Ill. 1996) ("[T]he Restatement (Second) of Contracts ... rejects ... the doctrine of mutuality of obligation ... ").
Recently, the notion has received new emphasis, however. Focus on the so-called “bargain principle”—that “bargains between capable and informed actors are [or should be] enforced according to their terms”—has fueled this trend. The bargain principle rests in part on economic assumptions that encourage courts to trust decisions made by seekers of wealth, either because of courts’ respect for their autonomy or because trusting them is thought to lead under optimal market conditions to some good for society, such as greater societal wealth. The popular understanding of classical economics ap-

188. See, e.g., Eyre v. Potter, 56 U.S. (15 How.) 42, 59-60 (1853) (“The question of equivalents or of exact adequacy of consideration cannot well be raised. The parties, if competent to contract and willing to contract, were the only proper judges of the motive or consideration operating upon them; and it would be productive of the worst consequences if, under pretexts however specious, interests or dispositions subsequently arising could be made to bear upon acts deliberately performed, and which had become the foundation of important rights in others.”); Smith v. Loring, 2 Hammond 440, 455 (Ohio 1826) (“Inadequacy of consideration will never avoid a contract, unless it is so gross that fraud will necessarily be inferred.”); THOMAS HOBBES, LEVIATHAN I.XV.102 (“[T]he value of all things contracted for, is measured by the Appetite of the Contractors: and therefore the just value, is that which they be contented to give.”); RASTELL, supra note 164, at 47-48 (“[B]ut if any things were given for the xx.shillings though it were not but to the value of a penny, then it had ben a good contracte.”).

189. Eisenberg, Probability & Chance, supra note 2, at 1010; Melvin Aron Eisenberg, The Bargain Principle and Its Limits, 95 Harv. L. Rev. 741 (1982) [hereinafter, Eisenberg, Bargain Principle]. The principle that courts will not inquire into the adequacy of consideration is a corollary to it. See id. at 745.

190. See Eisenberg, Probability & Chance, supra note 2, at 1010 (“This principle rests in large part on the premises that bargains produce gains through trade, that capable and informed actors are normally the best judges of their own utilities, and that those utilities are revealed in the terms of the parties’ bargain.”); Eisenberg, Bargain Principle, supra note 189, at 743-47; Eisenberg, Principles, supra note 2, at 643 (“Exchange creates surplus, because each party presumably values what he gets more highly than what he gives. A modern free-enterprise system depends heavily on private planning and on credit transactions that involve exchanges over time.”); see also Trebilcock, supra note 183, at 167-68. Of course, enforcement of the half-executed exchange is justified on grounds of fairness.
peared to support these assumptions as does the popular understanding of neo-classical economics.

The bargain principle has for centuries influenced the doctrine of consideration. As originally formulated, the doctrine of consideration concerned itself generally with reasons for making a promise or for grounding an action in assumpsit. When defined as a good reason or appropriate circumstance for making a promise, consideration could (and did) include marriage, detriment, benefit, a return promise, natural love and affection between immediate family members, a prior debt, and possession of assets by executors and administrators. Still, courts as early as the sixteenth century considered reciprocity or trade to be a paradigmatic reason for making a promise or grounding an action on a promise. Occasionally, and as other forms of consideration declined or were used only in certain more rigid classes of cases, the courts stretched the reciprocity paradigm to cover remedy-


Every individual necessarily labours to render the annual revenue of the society as great as he can. He generally, indeed, neither intends to promote the public interest, nor knows how much he is promoting it. . . . [B]y directing that industry in such a manner as its produce may be of the greatest value, he intends only his own gain, and he is in this, as in many other cases, led by an invisible hand to promote an end which was in no part of his intention. Nor is it always the worse for the society that it was no part of it. By pursuing his own interest he frequently promotes that of society more effectually than when he really intends to promote it. I have never known much good done by those who affected to trade for the public good. It is an affectation, indeed, not very common among merchants, and very few words need to be employed in dissuading them from it.

Id.

192. See sources cited supra notes 183, 189-90.

193. See Patrick S. Atiyah, The Rise and Fall of Freedom of Contract 143-67 (1979); Baker, English Legal History, supra note 8, at 369-91; Simpson, supra note 8, at 406-08; Spelman's Reports, supra note 8, at 288-97. But see Ibbetson, supra note 8, at 67 (concluding that though the consideration doctrine itself pointed to these concerns, the theory behind enforcement of promises in assumpsit focused on the reciprocity of exchanged performances or promised performances that existed in mutual agreements).

194. These types of consideration are thoroughly discussed, with numerous citations, by Simpson, see Simpson, supra note 8, at 412-45, 459-65, and by the author, see Val D. Ricks, American Mutual Mistake: Half-Civilian Mongrel, Consideration Reincarnate, 58 La. L. Rev. 663, 696-700.

195. See, e.g., Baker & Milsom, Sources, supra note 8, at 488 (citing the arguments of Fletewoode and Wray in Sharington v. Strotton, a 1565 case); Christopher St. Germain, Doctor and Student (1531), reprinted in Baker & Milsom, Sources, supra note 8, at 483 (“And a nufe contract is where a man maketh a bargain and sale of his goods or lands without any recompense appointed for it.”); Ibbetson, supra note 8.
worthy cases in assumpsit in which no real trade occurred. Consid-
eration as a doctrine was not limited to the reciprocity idea, but the
popularity of the reciprocity paradigm and the principles supporting it
allowed judges sometimes to avoid finding substantive reasons for
making a promise in a case so long as economic motive and the exist-
ence of some formal reciprocity existed. On the other hand, courts
have always distrusted their ability to discern motive, so sometimes
consideration analysis focused merely on the reciprocity itself—
whether a thing was bargained-for or is mutually induced. This
"bargain principle," which pays little attention to what is bargained
for so long as bargaining is shown, is now taken by many in America
to be the meaning of the consideration doctrine (though remnants

lyn, the promisor promised to pay on consideration that the promisee show the
promisor a document embodying a legal obligation that the promisor pay. Had
the plaintiff neither done nor promised anything, the plaintiff still could have had
some other remedy, though perhaps for less in damages. The court required a
showing of consideration only so that the action could be brought in assumpsit.
See BAKER, LEGAL PROFESSION, supra note 8, at 377; SIMPSON, supra note 8, at
446-48; Ricks, supra note 194, at 698.

197. Sometimes they would even imply the trade when the motive existed. For in-
stance, in Game v. Harvie, Yelv. 51, 51, 80 Eng. Rep. 36, 36 (K.B. 1605), the court
found consideration for a promise to repay a loan on demand. The loan appeared
illusory, because the lender could demand it back immediately, but the whole
court, understanding the economic context, held contra: "Popham [J.] said... the
promise is grounded upon an accommodation, viz. a loan, which implies an use of
the [money] by the defendant." Id. The court was willing to imply an obligation
of the creditor to allow the use of the money, and the benefit of using the money
was the consideration. The court took the economic motives of the parties into
account quite explicitly: "[W]hen the intent of the parties may stand with the law,
it shall be expounded accordingly . . . ." Id.

198. Holmes is said to have typified this trend. See FARNSWORTH, supra note 18, § 2.6;
stating, "[C]onsideration is a form as much as a seal," and "The root of the whole
matter is the relation of reciprocal conventional inducement, each for the other,
between consideration and promise." OLIVER WENDELL HOLMES, THE COMMON

the consideration for a promise must be an act or a return promise, bargained for
and given in exchange for the promise."); Panasonic Comms. & Systems Co. v.
State, 691 A.2d 190, 194 (Me. 1997) ("Where there is no bargain . . . there can be
no consideration."); Baehr v. Penn-O-Tex Oil Corp., 104 N.W.2d 661, 665 (Minn.
1960) ("Consideration requires that a contractual promise be the product of a bar-
gain. However, in this usage, 'bargain' does not mean an exchange of things of
equivalent, or any, value. It means a negotiation resulting in the voluntary as-
sumption of an obligation by one party upon condition of an act or forbearance by
the other. Consideration thus insures that the promise enforced as a contract is
not accidental, casual, or gratuitous, but has been uttered intentionally as the
result of some deliberation, manifested by reciprocal bargaining or negotiation.
In this view, the requirement of consideration is no mere technicality, historical
anachronism, or arbitrary formality. It is an attempt to be as reasonable as we
of the older rules requiring actual substantive reasons, proof of rational economic motive, remain\textsuperscript{200}). Reciprocity itself is thought to demonstrate economic motive, at least in the form of self-interest. The economic assumptions underlying the bargain principle thus seem to warrant enforcement especially when an actual exchange of promise for promise or performance occurs. Then the opinions and plans of two self-interested wealth-seekers coincide, and the resulting transaction seems doubly likely to be in the best interests of all.\textsuperscript{201}

As part of this move toward trusting wealth-seekers, courts have promoted doctrines that seem consistent with leaving the wisdom of the promise in the hands of the promisor—with subjective valuation of the thing exchanged in the hands of contracting parties. These doctrines include the popular mantras: "[T]he law does not inquire into the adequacy of consideration"\textsuperscript{202} and "a peppercorn may constitute a 

\textsuperscript{200} See, e.g., Duncan v. Black, 324 S.W.2d 483, 486-87 (Mo. Ct. App. 1959) (opining that a disputed claim must be a "discernible mole hill" from which a mountain might be made before settlement of it may be consideration for a promise to pay money); Rosyer v. Langdale, Style 248, 82 Eng. Rep. 684 (1650); Peck v. Loveden, C. E. Eliz. 804, 78 Eng. Rep. 1031 (1602); John William Smith, The Law of Contracts 182 ("The forbearance to prosecute an action is not a valid consideration for a promise to pay a sum of money to the plaintiff, unless there be a good cause of action.").

\textsuperscript{201} Friedman, supra note 183, at 13; Trebilcock, supra note 183, at 164 ("[P]romises or commitments made in the course of economic transactions, because of their supposedly mutually beneficial qualities, are singled out for specially privileged legal recognition."). A bargain in the classic sense, with each party voluntarily contributing some performance or promise, is most likely, assuming perfect competition and that the transacting parties are sufficiently informed, to result in transactions which are Pareto efficient, which means that the transaction benefits one party and either benefits the other or at least makes it no worse off. If transactions generally are Pareto efficient, then society benefits from the exchange because resources are moved to a more efficient use (to those who value them most highly), where they can be exploited most successfully. As a result of such transfers, society is best able to maximize its wealth of resources. Perhaps just as importantly, because neither party is made worse off from the transaction, the requirement is consistent with contract law's other requirement that parties to contracts freely assent. Moreover, Pareto efficient transactions are at least fair in result to both parties, because neither is made worse off through the transaction.

An autonomy theorist might also posit that a bargain freely made between two individuals allows both to exercise their freedom to the fullest and also increases their freedom by giving to them the benefits of their cooperation. See Fried, supra note 182, at 7-14.

\textsuperscript{202} See, e.g., Pilarczyk v. Morrison Knudsen Corp., 965 F. Supp. 311, 322 (N.D.N.Y. 1997) ("Thus, in the absence of fraud or unconscionability, the adequacy of consideration is not a proper subject of judicial review."); Chicago & A.R. Co. v. Derkes, 3 N.E. 239, 242 (Ind. 1855) ("The rule is almost elementary that where parties get all the consideration they bargain for, they cannot be heard to complain of the want or inadequacy of the consideration."); Harford County v. Town
valuable consideration." 203 Neither of these rules was created to support that result. 204 But by this century courts were citing both as grounds for reviewing only for sincerity contracting parties’ subjective decisions as to the value of things bargained for. 205

Some commentators went further, claiming that the value of the consideration was irrelevant. These scholars argued that consideration was merely form, much as was a seal, so that if the form of a bargain appeared as part of the transaction, the promise should be enforced even though no actual bargain occurred. 206 Occasionally courts speak in ways that suggest they will uphold a mere form of a bargain, 207 though it is doubtful that the law has ever gone this far. 208

203. See, e.g., Leventhal v. New Valley Corp., No. 91 CIV. 4238, 1992 WL 15989, at *6 (S.D.N.Y. Jan. 7, 1992) ("[S]ufficient consideration is traditionally found in a peppercorn . . . ."); Weiner v. McGraw-Hill, Inc., 443 N.E.2d 441, 445 (N.Y. 1982) ("The value or measurability of the thing forborne or promised [as consideration] is not crucial so long as it is acceptable to the promisee. Thus, courts have not hesitated to find sufficient consideration . . . . in what is now [known as] the proverbial peppercorn . . . ."); King County v. Taxpayers of King County, 949 P.2d 1260, 1279 (Wash. 1997) ("Even a peppercorn is legally sufficient consideration to support a promise."); Whitney v. Stearns, 16 Me. 394, 397 (1839) (stating, in an assumpsit for rent, that "[a] cent or a pepper corn . . . would constitute a valuable consideration.").

204. As to the "adequacy of consideration" rule, see GORDLEY, supra note 172, at 147-48, and SMASE, supra note 8, at 445-49. The peppercorn rule originated in English real property law, where a consideration of a peppercorn would validate certain grants of land. See, e.g., Ince v. Everard, 6 T.R. 545, 547, 101 Eng. Rep. 694 (1796) (Ch. J. Kenyon) ("[T]hat kind of consideration is in many cases inserted for no purpose whatever, though in others it is of importance, i.e., where an estate is in a trustee and that consideration is inserted to make a deed valid as to him under the Statute of Uses."); see also Whitney v. Stearns, 16 Me. 394, 397 (1839) (stating, in an assumpsit for rent, that "A cent or a pepper corn . . . would constitute a valuable consideration."). Farnsworth traces it to Blackstone and Coke. See FARNSWORTH, supra note 18, § 2.11 n.2.

205. See supra notes 202-03.

206. See RESTATEMENT OF CONTRACTS § 84 (1932) ("Consideration is not insufficient because of the fact . . . that obtaining it was not the motive or a material cause inducing the promisor to make the promise . . . ."); id. cmt. b ("[T]he motive or the cause [of the promise] is immaterial."); HOLMES, supra note 198, at 215 ("[C]onsideration is a form as much as a seal."); id. at 230 ("The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise.").

207. See In re Xonics Photocchemical, Inc. v. Mitsui & Co., 841 F.2d 198, 209 (7th Cir. 1988) ("Nominal consideration is, in general, all that is needed to satisfy the requirements of the law of contracts . . . ."); GLS Dev., Inc. v. Wal-Mart Stores, Inc., 944 F. Supp. 1384, 1395 n.9 (N.D. III. 1996) ("Nominal consideration is, in gen-
Some courts held that the form of a bargain, mere nominal consideration, if paid, would uphold an option contract.\textsuperscript{209} (Probably the difficulty of valuing option contracts contributed to these holdings. An optionee bets on the value of the optioned property moving up or down during the option period\textsuperscript{210}; who else knows what the bet is worth?)

The end of this slippery slide toward trusting promisors surely ends in abolition of the consideration requirement. If trusting promisors is the law's thrust, then a doctrine appears passe that checks the reasons promisors may have for promising or even limits promisors' freedom to bind themselves consensually.

Courts jumped off the slide before they hit bottom, however. Though courts have applied consideration doctrine with a more bargain-process-focused attitude, they retain the form of law set out in the late sixteenth century. This point is crucial to the life of the mutuality of obligation doctrine, because with other doctrines the law retains the mutual promise rule. While the relevance of the

\begin{quote}
\textsuperscript{208} Even the example the first Restatement used to illustrate that motive was irrelevant displayed a clear inducement and motive for the promise:

\begin{quote}
A wishes to make a binding promise to his son \(B\) to convey to \(B\) Blackacre, which is worth \$5000. Being advised that a gratuitous promise is not binding, \(A\) writes to \(B\) an offer to sell Blackacre for \$1. \(B\) accepts. \(B\)'s promise to pay \$1 is sufficient consideration.
\end{quote}
\end{quote}

\begin{quote}
\textsuperscript{209} See Wheat v. Morse, 17 Cal. Rptr. 226 (Cal. Ct. App. 1961) (upholding an option given in consideration of \$1); Real Estate Co. of Pittsburgh v. Rudolph, 153 A. 438 (Pa. 1930). Some courts do not require actual payment, but only a recital. See Smith v. Wheeler, 210 S.E.2d 702 (Ga. 1974); Real Estate Co. of Pittsburgh, 153 A. at 439. These decisions often infer a promise to pay from a recital of payment, see Smith, 210 S.E.2d at 703, or hold that the optionor is estopped by the recital to deny payment of consideration, see Real Estate Co. of Pittsburgh, 153 A. at 439-40.
\end{quote}

\begin{quote}
\textsuperscript{210} See Marsh v. Lott, 97 P. 163, 165 (Cal. Dist. Ct. App. 1908) ("[N]o standard exists whereby to determine the adequate value of an option to purchase specific real estate. The land has a market value susceptible of ascertainment, but the value of an option upon a piece of real estate might, and oftentimes does, depend upon proposed or possible improvements in the particular vicinity.")
\end{quote}
The consideration doctrine has declined as a policeman of agreements, but it still places at least three important limitations on promisors' freedom to value what they receive in return for a binding promise:

(1) The promisor must subjectively believe the consideration is valuable. This conclusion follows from the law's requirement that the consideration be bargained-for, or mutually induced. To induce, a thing must have some subjective value in the mind of the person induced.

(2) The promisor's belief that the consideration is valuable must have some basis in rationality; no promisor could rationally believe valuable something that can have no value. This rule follows from the notion that the bargain or inducement must not be a mere pretense: Claims to subjective value fail as a factual matter when they can not be understood or believed by the trier of fact.

(3) The law requires an actual return performance or promise (meaning a promise of some actual performance). This limitation excludes mere probabilities of return promises or performances. In the mutual promise context, courts often imply the substance of this limitation by saying that a promise is consideration only if the promised performance would itself also be consideration; courts recognize that promises are not induced by another's mouthing a return promise but by the expectation of actual performance of that promise. The illusory promise rule assumes a similar substantive limitation on mutual promises by requiring that the counter-promise actually name a future performance and not the mere possibility of one.

These limitations on promisors' subjective valuation never require in their operation that a court overtly determine the value of a consideration. The first two merely require that the subjective value be sincerely asserted and not irrational. This limitation may be phrased as a factual conclusion formally unrelated to value (i.e.: "you were not actually induced by this; you are lying" or "this thing could not have been an inducement; this thing was merely nominal"). The third is a 400 year-old limitation on what can count as consideration, and is old

211. Of course, other doctrines police the equality of bargains, most notably unconscionability but also fraud, mutual mistake, see Ricks, supra note 194, at 668-71, and economic duress, see RESTATEMENT (SECOND) OF CONTRACTS § 176(2) (1981).

212. See Software Clearing House, Inc. v. Intrak, Inc., 583 N.E.2d 1056, 1064 (Ohio Ct. App. 1990) ("The mere utterance of a promise does not supply the actual consideration for the bargain. Rather, '[i]t is the content of the promise or the actual anticipated performance which supplies consideration for the bargain.'" (Internal citations omitted.)); RESTATEMENT (SECOND) OF CONTRACTS § 75 (1981) ("[A] promise which is bargained for is consideration if, but only if, the promised performance would be consideration."); FARNSWORTH, supra note 18, § 2.4; CALAMARI & PERILLO, supra note 9, at 200.

213. For a discussion of the illusory promise rule, see supra text accompanying notes 19-31.
enough that no court justifies it. However, a value determination is inherent in all of these limitations: in the first two because the ability to say what rationally may be valued puts outside limits on the parties' subjective choice, and in the third because the requirement of an actual performance or promise prevents supposedly more risky categories of return (such as probabilities) from becoming the inducement that makes a promise enforceable.

Some commentators would have the law depart from this sixteenth century form to reflect more closely the economic theories which support the bargain principle. If autonomy principles encourage courts to trust promisors, then all voluntary promises ought to be presumptively enforceable. If greater wealth or greater good to society results from promises made by seekers of wealth freely and upon adequate information in a competitive market, then enforcement of all such promises should result in greater wealth, and should be encouraged. If serious promises made by free actors were enforced on these bases, the requirement of a return promise or performance, an actual bargain, would become unnecessary.

In a majority of serious promise cases an actual bargain exists in practice, because economic actors do not often bind themselves without at least a reciprocal promise of some economic return. But also sometimes assets are invested, and promises made, with no reciprocal promise of or actual economic return. Investors in stock, for instance, might promise to pay for such securities without even a promise of return; only a potential or probability of return exists. Everyone agrees that a promise given in exchange for actual securities is enforceable. Analogizing from cases such as this, consideration reformers suggest that rational probability of return, or that the promise rationally be thought to facilitate exchange, be the test for enforce-

214. See Fried, supra note 182, at 12 ("To have force in a particular case promises must be assumed to have force generally. Once that general assumption is made, the effects we intentionally produce by a particular promise may be morally attributed to us.").

215. As supporting this hypothesis, I suggest Professors Barnett, Craswell, Eisenberg, Farber & Matheson, Gordon, and Wessman. See Barnett, supra note 2, at 518; Craswell, supra note 2, at 490-91, 497-99; Eisenberg, Probability & Chance, supra note 2, at 1005; Farber & Matheson, supra note 2, at 903; Gordon, Commercial-Gift, supra note 2, at 293; Gordon, Dialogue, supra note 2, at 987; Wessman, Consideration I, supra note 2, at 45.

216. Accordingly, Barnett, Farber & Matheson, Gordon, and Wessman recommend that consideration doctrine be abolished for promises made in these circumstances. See Farber & Matheson, supra note 2, at 945; Barnett, supra note 2, at 529-32 (adopting Farber & Matheson's position); Gordon, Commercial-Gift, supra note 2, at 286-87, 290-91 (recommending that the consideration requirement be abolished in commercial transactions); Wessman, Consideration I, supra note 2, at 115-16 (recommending enforcement "[e]ven if it is not a bargain"). Craswell treats it as irrelevant. Craswell, supra note 2, at 497-99.
ment. They would drop the requirement of an actual return promise or performance and instead focus on economic motive. These commentators would enforce, for instance, potential seller Sally’s promise to maintain a low price for a certain time period, so long as potential buyer Bob assented to Sally’s proposal by acknowledging it. These commentators would enforce Sally’s promise even though Bob actually gives neither a promise nor performance in exchange, because of their respect for Sally’s autonomy or the economic assumptions underlying the bargain principle.

If the reforms suggested by these commentators were accomplished, the mutual promise rule would be abrogated; a bargain—a return promise or performance—would no longer be required. Virtually all bargain promises are designed to encourage a rational probability of return or to facilitate exchange, to induce another to action. (That is what “mutual inducement” means, less the requirement of an actual return promise or performance, the third limitation on the parties’ ability to bind themselves through their subjective valuations of things bargained for.) If the law begins to allow a probability of return to function as consideration, as an inducement on which to ground an action on a promise, then all promises meant to induce or make probable economic action in response are enforceable. The mutual promise rule would be superfluous.

217. See Barnett, supra note 2, at 529; Eisenberg, Probability & Chance, supra note 2, at 1005; Farber & Matheson, supra note 2, at 925-38; Gordon, Commercial-Gift, supra note 2, at 286-87, 290-91; Wessman, Consideration I, supra note 2, at 45, 115-16.

218. Barnett, Craswell, Eisenberg, Farber & Matheson, Gordon, and Wessman suggest Sally should be bound here. See Barnett, supra note 2, at 529-32; Craswell, supra note 2, at 497-98; Eisenberg, Probability & Chance, supra note 2, at 1020-24; Farber & Matheson, supra note 2, at 925-34; Gordon, Commercial-Gift, supra note 2, at 290-91; Wessman Consideration I, supra note 2, at 115-16. These commentators might argue such a transaction would likely be Pareto efficient because Sally would make no such promise unless Sally perceived a benefit to accrue to her as a result. Moreover, Sally obtains a benefit, the increased probability of transacting with Bob. And Bob suffers no or very minimal cost by acknowledging Sally’s promise. Bob is made no worse off by the transaction (especially if the agreement is enforced, but even if not), and perhaps gains a benefit because Bob then may have the option of calling on Sally to supply at the price offered. Thus, Pareto efficiency appears possible even without Bob’s assent.

219. See Barnett, supra note 2, at 529-32; Craswell, supra note 2, at 497-99 (“When the motive for commitment is to induce an efficient level of reliance, the commitment need not be mutual.”); Eisenberg, Probability & Chance, supra note 2, at 1010-11 (recommended enforcement even in the absence of a classical bargain); Farber & Matheson, supra note 2, at 945 (recommending enforcement “without regard to the presence of consideration or reliance”); Gordon, Commercial-Gift, supra note 2, at 286-87, 290-91 (recommending that the consideration requirement be abolished in commercial transactions); Wessman, Consideration I, supra note 2, at 115-16 (recommending enforcement “if even if it is not a bargain”).
If courts never asked whether a mutual promise exists, the law would no longer need to hold that in such circumstances both should be bound, or neither, absent good reason. Thus, the mutuality of remedies or obligation doctrine would likewise become superfluous. One party could be bound without the other on the theory promoted by these reformers. It is thus not surprising to find that many of these commentators recommend that the mutuality of obligation doctrine as well as the consideration doctrine be abrogated.220

I do not discuss in this paper whether this reform of consideration would be appropriate.221 I wish to note, however, that the position taken by this paper is mainly consistent with these proposals. This paper does not advocate that the consideration doctrine be retained. It proposes only that, until it is overruled, the mutuality of obligation doctrine must remain viable. Though some courts seem to have dropped the requirement of a reciprocal promise or performance in certain narrow classes of cases,222 in the vast majority, courts still appear to require a return promise or performance.223 As long as they do, they must retain the mutuality of obligation doctrine.

B. Why Courts and the Restatement (Second) Tried to Overrule Mutuality of Obligation

As noted, some lines of case law demonstrate that the ideas espoused by the commentators just discussed have carried weight with

220. See e.g., Barnett, supra note 2, at 529-36; Farber & Matheson, supra note 2, at 929-34; Gordon, Commercial-Gift, supra note 2, at 283, 290-92, 306-07; Wessman, Consideration II, supra note 2, at 713; Wessman, Consideration I, supra note 2, at 45.

221. Perhaps we are now confident enough in our economic principles actually to enact them into law. Whether the actual success of those principles should be the goal of contract law is another matter. Trebilcock, for instance, notes:

[W]elfare-based theories of promise-keeping pose their own set of indeterminacies. That is, if the objective of legal rules in this context is maximizing the net social benefits of promissory activity—the benefits of the promises minus their costs—or regulation promises so as to maximize the net beneficial reliance derived from promise-making activity, difficulties arise in determining which legal sanctions optimize the interactions between promisor and promisee and minimize precaution costs for both parties.

TREBILCOCK, supra note 183, at 134-85. But see Craswell, supra note 2, at 501-02 (responding to the argument that courts do not have the ability to judge efficiency). But whether courts can determine efficiency or not, requiring courts to focus on actual economic or other guiding principles would be a vast improvement over their current discussions of doctrines such as consideration that reflected a muddled hodge-podge of rationales when they were invented and remain muddled now.

222. See cases cited infra note 224 and various promissory estoppel cases cited in Farber & Matheson, supra note 2, at 903.

223. See, e.g., sources cited supra notes 6, 9, 64.
In some of these cases, the economic assumptions underlying the bargain principle encourage enforcement of a promise but for the defect that no return performance or promise exists. One such situation occurs when an employer publishes an employee handbook promising job security or a disciplinary procedure but leaving the employee free to quit at any time. In such cases, some courts have dropped the consideration doctrine explicitly and entirely, as the commentators would suggest. Consider the following from *Toussaint v. Blue Cross & Blue Shield of Michigan* (1980).

224. Many of these cases involve employers’ promises to employees, such as (1) promises for stock options, see Beard v. Elster, 160 A.2d 731, 735 (Del. Super. Ct. 1960) (analyzing the validity of a promise for stock options on the basis of future benefits the corporation might obtain); Zupnick v. Goizueta, 698 A.2d 384, 388 (Del. Ch. 1997) ("[T]he consideration for stock options is often the reasonable prospect of obtaining the employee's valued future services."); or (2) promises for job security, see Murphy v. Birchtree Dental, P.C., 964 F. Supp. 245, 247-50 (E.D. Mich. 1997); *In re Certified Question*, 443 N.W.2d 112 (Mich. 1989); Toussaint v. Blue Cross & Blue Shield of Michigan, 292 N.W.2d 880 (Mich. 1980); Hetes v. Schefman & Miller Law Office, 398 N.W.2d 577, 578 (Mich. Ct. App. 1988); Damrow v. Thumb Coop. Terminal, Inc., 337 N.W.2d 338, 342-43 (Mich. Ct. App. 1983). But this movement is not limited to employment contexts. See, e.g., Arrow Indus. v. Zions First Nat'l Bank, 767 P.2d 935 (Utah 1988) (including the "good will flowing from" certain promises as well as other benefits in its consideration analysis). Some prize cases also seem to adopt a similar theory. See *Society Theater v. City of Seattle*, 203 P.2d 21, 22 (Wash. 1922) ("The fact that prizes of more or less value are to be distributed will attract persons to the theaters who would not otherwise attend. In this manner those obtaining prizes pay consideration for them, and the theaters reap a direct financial benefit."). A variety of ways to account for enforcement of advertising games is discussed in Mark B. Wessman, *Is "Contract" the Name of the Game: Promotional Games as Test Cases for Contract Theory*, 34 Ariz. L. Rev. 635 (1992). Traces of this kind of thinking about promises is, of course, found throughout the history of contract law. Cf. *Wild v. Harris*, 7 C.B. 999 (1849) (married man's promise to marry after a reasonable time held valid consideration for woman plaintiff's promise to marry him because his wife might die during the reasonable time; the possibility of marriage was counted a consideration).

225. *Toussaint v. Blue Cross & Blue Shield of Michigan*, 292 N.W.2d 880 (Mich. 1980), was such a case. Toussaint was a middle manager at Blue Cross. When he was hired, Toussaint was told he would be employed as long as he did his job. See *id.* at 884 n.5. In addition, a Blue Cross employee handbook stated a disciplinary procedure and a policy that Blue Cross would fire employees "for just cause only." *Id.* at 884. After Blue Cross fired Toussaint with no disciplinary procedure and no explanation, Toussaint sued. Blue Cross objected that, because Toussaint was free to leave at any time, any promise made by the bank lacked mutuality. See *id.* at 885. There was apparently no evidence in the record that Toussaint relied on the handbook. See *id.* Nor did the court rely on that fact. Instead, the court grounded Blue Cross's contractual obligation to Toussaint on the probability that Blue Cross's handbook policy would generate an economic return. See *id.* at 892; see also *id.* at 895 ("Having announced the policy, presumably with a view to obtaining the benefit of improved employee attitudes and behavior and improved quality of the work force, the employer may not treat its promise as illusory."). The majority opinion does not discuss Blue Cross's mutuality objection, but this
While an employer need not establish personnel policies or practices, where an employer chooses to establish such policies and practices and makes them known to its employees, the employment relationship is presumably enhanced. The employer secures an orderly, cooperative and loyal work force, and the employee the peace of mind associated with job security and the conviction that he will be treated fairly. No pre-employment negotiations need take place and the parties' minds need not meet on the subject; nor does it matter that the employee knows nothing of the particulars of the employer's policies and practices or that the employer may change them unilaterally. It is enough that the employer chooses, presumably in its own interest, to create an environment in which the employee believes that, whatever the personnel policies and practices, they are established and official at any given time, purport to be fair, and are applied consistently and uniformly to each employee. The employer has then created a situation "instinct with an obligation."\(^2\)

In other words, the mere probability of the employer's economic advance was sufficient benefit to the employer to ground the employee's action for breach of promise, even without traditional consideration or even a return acknowledgment of assent from the employee. Under such an analysis, there is no need for any reciprocal performance or promise and consequently no need for any reciprocal remedy or mutuality of obligation doctrine.\(^2\)

Others courts have explicitly declined to drop the consideration requirement, however:

The employee handbook was not distributed until about two years after [the employee] was hired. It constituted a unilateral statement of company policies and procedures. Its terms were not bargained for, and there was no meeting of the minds. The policies may be changed unilaterally at any time. The employee handbook was not a part of [the] employment contract at the time she was hired, nor could it have been a modification to her contract because there was no new and independent consideration for its terms.\(^2\)

Still others, such as *Pine River State Bank v. Mettille*,\(^2\) purport to find consideration but are confused by the mutuality of obligation issue. *Mettille* found consideration in the employee's return performance: "[T]he consideration here . . . is Mettille's continued [job]

rationale dispenses with the need for it. Indeed, this rationale dispenses with the need for consideration at all and rests solely on the economic principles supporting the bargain principle. The employee's assent is not even necessary. A concurring opinion in the case based consideration on Toussaint's actual performance, as if the offer of job security were a unilateral promise requesting that Toussaint accept by beginning work for Blue Cross. See id. at 899-900 (Ryan, J., concurring). Still, Toussaint would remain free to leave. The concurrence viewed this case as a textbook example of unilateral contract: Toussaint is to give Blue Cross a chance to show it's a good employer in exchange for a promise of job security.\(^2\)

\(^{226}\) *Id.* at 892.

\(^{227}\) Accordingly, several commentators have recommended in conjunction with promoting the enforcement of promises meant to encourage exchange that the consideration doctrine itself be abrogated. See supra Part III.A.

\(^{228}\) *Gates v. Life of Montana Ins. Co.*, 638 P.2d 1063, 1066 (Mont. 1982) (granting relief to the employee on other legal grounds factually based on the promulgation of the handbook).

\(^{229}\) 333 N.W.2d 622 (Minn. 1983).
performance despite his freedom to leave.\footnote{230} In essence, \textit{Mettille} characterized the handbook as a unilateral contract, the bank promising to perform according to the handbook if Mettille gave the bank a chance to show what a fine employer it was by continuing to come to work for a period.\footnote{231} The mutuality of obligation doctrine is irrelevant to such an agreement, as noted, because no need exists for a mutual remedy.\footnote{232} The court, however, unnecessarily purported to overrule the doctrine of mutuality as an inquiry into adequacy of consideration:

\begin{quote}
[Another] argument is that job security provisions lack enforceability because mutuality of obligation is lacking. Since under a contract of indefinite duration the employee remains free to go elsewhere, why should the employer be bound to its promise not to terminate unless for cause or unless certain procedures are followed? The demand for mutuality of obligation, although appealing in its symmetry, is simply a species of the forbidden inquiry into adequacy of consideration . . . .\footnote{233}
\end{quote}

What the \textit{Mettille} court meant by "mutuality of obligation" under this paragraph is far from clear. Several meanings are consistent with the passage. One is that the court thought mutuality required equivalence of exchange. It does not,\footnote{234} so overruling some general notion of equivalence would not overrule mutuality. If general equivalence of exchange is what the court meant to overrule, it overruled a red herring.

The \textit{Mettille} court might have meant the minimal equivalence required by the mutual promise rule, namely, that a promise occur on both sides (though a performance on one side should suffice, and the

\footnote{230} \textit{Id.} at 629.
\footnote{231} This unilateral contracts approach to employer statements regarding job security has become fairly regular. See, e.g., Deborah A. Schmedemann & Judi McLean Parks, \textit{Contract Formation and Employee Handbooks: Legal, Psychological, and Empirical Analyses}, 29 \textit{Wake Forest L. Rev.} 647 (1994); see also generally Mark Pettit, Jr., \textit{Modern Unilateral Contracts}, 63 B.U. L. Rev. 551 (1983). Farber & Matheson argue that the unilateral contract analysis in \textit{Mettille} was disingenuous, a cover-up for dropping the consideration requirement entirely in favor enforcing a promise made in furtherance of economic activity. See Farber & Matheson, \textit{supra} note 2, at 920-22 ("[T]he change in terms is not bargained for and does not require any additional commitment from or detriment to them."). Their point is valid, though the \textit{Toussaint} analysis, \textit{see supra} notes 224-26, and accompanying text, is a better example of the kind of rule Farber & Matheson advocate. Eisenberg has recently noted the somewhat economically transparent distinction between unilateral contracts in which the promisor seeks to induce another to give it a chance and the kind of structural arrangement enforced as such in \textit{Toussaint}. See Eisenberg, \textit{Probability & Chance}, \textit{supra} note 2, at 1012-18, 1020-23.
\footnote{234} Even recent treatises recognize that mutuality of obligation has not meant equivalence as a general matter. See, e.g., \textit{Perillo & Bender}, \textit{supra} note 2, § 6.1 (omitting discussion of this potential meaning of mutuality of obligation); 2 \textit{Wisconsin}, \textit{supra} note 9, §§ 7:13, 7:15.
court eventually held that one did suffice). The requirement of a promise entails that some objective value be given, because a promise seems to be more valuable in the abstract than an expectation without a promise.\textsuperscript{235} Inasmuch as the mutual promise doctrine requires such "equivalence," and the illusory promise doctrine ensures that substantive promises occur, the illusory promise doctrine and hence mutuality of obligation can be said to ensure equivalence.

But such an equivalence requirement is minimal in the extreme. One party might promise a "peppercorn" and the other Fort Knox, as long as both promises are bargained-for. Most expectations generated from promises seriously intended to facilitate exchange, such as by Sally's promise to supply mentioned above,\textsuperscript{236} are worth more than a promise of a peppercorn. Promises reasonably made to facilitate exchange thus may often result in closer equivalence than the mutual promise rule ensures. Further, later evidence of Minnesota decisions indicates that the Mettille court did not mean to overrule the equivalence required by the mutual promise rule. The court that decided Mettille still entertains illusory promise arguments,\textsuperscript{237} and its subordinate courts have since decided cases on illusory promise grounds.\textsuperscript{238} The Mettille court apparently did not overrule the mutual promise rule nor the illusory promise rule.

Did the Mettille court overrule the mutuality of obligation doctrine itself? It is possible that the Mettille court failed to perceive that the mutuality of obligation doctrine is only an affirmative presumption of equal remedies meant to ensure basic fairness. Instead, the court might have interpreted the rule in its negative form, as a strict condition that a promise to be consideration must be binding. As I have noted, this view has support in some prior case law. Two judges in Butterye v. Goodman\textsuperscript{239} (1583) appear to have taken the same view, for instance.\textsuperscript{240}

If one takes this view, then the notion that the mutuality of obligation doctrine encroaches on the subjective value judgments of the parties appears unavoidable. As noted, the only objective limitations on the parties' ability to value consideration subjectively are that their valuation have some rational basis and that consideration consist in a

\textsuperscript{235} A bird in the bush is worth two in the air?
\textsuperscript{236} See supra text accompanying notes 218-19.
\textsuperscript{237} In re Welfare of D.D.G., 558 N.W.2d 481, 484-85 (Minn. 1997) (discussing the illusory promise doctrine without mentioning that it is overruled).
\textsuperscript{239} BAKER, LEGAL PROFESSION, supra note 8, at 382-83.
\textsuperscript{240} See supra text accompanying notes 79-83.
promise or performance.\textsuperscript{241} An unenforceable promise is at least a promise and can rationally be thought valuable. Stated another way, contracting parties do not bargain for a legal obligation but only for a return promise, as Oliphant said in 1928.\textsuperscript{242} Therefore, any additional requirement that a promise be legally binding adds an additional layer of objective limitation on the parties' subjective valuation of the promise, an additional layer beyond the requirement of an actual, two-sided bargain.

Probably this is what the \textit{Restatement (Second)} authors intended to say in comment \textit{a} of section 78, intended as a justification for overruling the mutuality of obligation doctrine:

The value of a promise depends on its terms and on the probability that it will be performed. The value [of a promise] is not necessarily affected adversely by the fact that no legal remedy will be available in the event of breach; the probability of performance may be greater for a voidable or unenforceable promise, or even for a promise which is not binding or is against public policy, than for the judgment or decree of a court. In general the law of contracts leaves to the parties the valuation of a promise in the formation of a bargain. The fact that no legal remedy is available for breach of a promise does not prevent it from being a part of a bargain or remove the bargain from the scope of the general principle that bargains are enforceable.\textsuperscript{243}

This passage says in effect only that it is rational for the parties to bargain for an unenforceable promise. It is true that the language of the first two sentences gives objective criteria for judging value. These sentences are intended not to give a trier of fact a means of judging objective value and imposing it on the parties, however, but to justify to a court a party's subjective judgment that an unenforceable promise is valuable, in hope that the court will allow that subjective valuation to stand. (Any other reading of this comment would place the first two sentences in conflict with the third.)

The proper response to the argument in Mettille and the \textit{Restatement (Second)} is that it reads too much into the mutuality of obligation doctrine. Given the rule's history, no one can now reasonably argue that the rule (i) (a) functions negatively to strip from a reciprocal promise its status as consideration or (b) holds in all contexts more than presumptively, and (ii) thus constitutes an additional limitation on the ability of parties to value consideration subjectively. Quite to the contrary, the rule has operated for four centuries only as an affirmative, only to ensure that both sides of an agreement to extend credit, to trust each other's promises, are presumptively enforced, as a

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\textsuperscript{241} \textit{See supra} text accompanying notes 211-13.

\textsuperscript{242} \textit{See} Oliphant, \textit{supra} note 1, 25 \textsc{Colum. L. Rev.}, at 720 ("To say that the ordinary layman, making an offer for a bilateral contract, always or usually bargains for a legal obligation, is false."). \textit{But cf.} Williston, \textit{supra} note 9, at 865-68 (arguing that legal obligation is the meaning of "legal value" of consideration, which must be present in addition to a factual bargain).

\textsuperscript{243} \textit{Restatement (Second) of Contracts} § 78 cmt. a (1981).
bargain or contract. The mutuality of obligations principle thus ensures fairness and equality in the law, not additional objective value on both sides. Moreover, the doctrine operates as a presumption. It follows that if Mettille and the Restatement (Second) intended to repeal the mutuality of obligation doctrine as an inquiry into value, they have thrown out the fairness and equity baby with the value-carrying bath water.244

For these reasons, I suggest that Mettille is incorrect in its holding relative to mutuality of obligation. The Mettille court itself has shown that it did not mean to overrule the mutual promise or illusory promise doctrine.245 And if Mettille meant to overrule the mutuality of obligation doctrine itself, its rationale for doing so misses the point. The Restatement (Second)'s opinion on the mutuality of obligation doctrine suffers from the same malady. It's value-related rationale for dismissing the mutuality of obligation doctrine provides no ground for repealing the rule as properly understood. Moreover, even if Mettille and the Restatement (Second) intend this result for the negative, strong form version of mutuality of obligation, still the affirmative, presumptive version must hold or the connection between mutual promises and contract will be severed.

V. CONCLUSION

The doctrine of consideration and its corollary mutuality of obligation stand or fall together. If courts and commentators advocate abandonment of mutuality of obligation, they must also advocate abandoning the rule that mutual or bargained-for promises show a consideration or the more general notion that consideration is required. While consideration remains a requirement and consideration may be a mutual promise, the law must leave room for mutuality of obligation. Unless the law is willing to enforce arbitrarily one of the mutual promises to which parties have assented and not the other, it must be prepared to retain the mutuality of obligation doctrine at least in an affirmative, presumptive form.

244. It is possible, given Mettille's holding that the employee gave consideration for the employer's promise by continuing to perform, that the Mettille court may have intended to overrule application of the doctrine of mutuality of obligation to unilateral contracts. This reading is less clear from the passage in the case. Such a holding would also overrule a red herring. Neither the illusory promise nor the mutuality of obligation doctrine has ever properly applied to unilateral contracts, and courts have been saying so for generations. See, e.g., Wellington v. Apthorp, 13 N.E. 10, 12 (Mass. 1887) ("[I]f A. promises to B. to pay him a sum of money if he will do a particular act, and B. does the act, the promise thereupon becomes binding, although B., at the time of the promise, does not engage to do the act," and "the person to whom the promise is made is under no mutual, binding obligation on his part." (internal quotations and citations omitted)).

245. See supra notes 236-38.
Corbin said in 1926 that some had "urged . . . that the time has come to abandon the requirement of a consideration; but the existing decisions show that the courts would not now follow such a rule."\footnote{Corbin, supra note 12, at 556.} Perhaps it is time to try again, but in the meantime courts should be hesitant to toss aside the wisdom of ages past. Once lawyers forget their legal roots, they often feel free to cite any number of things Holmes said in support of overruling what their ancestors did.\footnote{Holmes stated: It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past. Oliver Wendell Holmes, \textit{The Path of the Law}, 10 \textit{Harv. L. Rev.} 457, 469 (1897) (Holmes could really turn a phrase). Consider also: The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. \textit{Holmes, supra} note 198, at 5.} Courts have no need to be hasty about overruling mutuality of obligation, however. It sits on solid ground. Coke\footnote{Edward Coke (1552-1634) was a law student in the mid-1570s, when the mutual promise rule may have been first explicated. He was called to the bar in April 1678, and practiced successfully throughout the 1580s. His formulation of the doctrine of consideration in \textit{Stone v. Wythipoole}, 78 Eng. Rep. 383 (K.B. 1587) (benefit to the promisor or detriment to the promisee), if it was his, which I doubt, withstood reformulation until this century. Coke became solicitor-general in 1592, speaker of the House of Commons the same year, attorney-general in 1593, chief justice of the Common Pleas in 1606, and chief justice of the King's Bench in 1613. King James removed him from the King's Bench in 1616. In his later years, he served in parliament. He left his case law Reports in 12 volumes, many of which he prepared for publication during his lifetime. He also left his Institutes, four treatises of various sorts, two of which he prepared for publication during his lifetime, and his commentary on Littleton's land law treatise. A great deal has been written and continues to be written of Coke. \textit{See e.g.}, Baker, \textit{Coke's Note-Books and the Sources of His Reports}, in \textit{Baker, Legal Profession}, supra note 8, at 177; Baker, \textit{New Light on Slade's Case}, in \textit{Baker, Legal Profession}, supra note 8, at 393; Allen D. Boyer, "Understanding, Authority, and Will": \textit{Sir Edward Coke and the Elizabethan Origins of Judicial Review}, 39 B.C. L. Rev. 43 (1997).} called the common law of his day, the day which generated the mutuality of obligation doctrine, an artificial perfection of reason . . . by many successions of ages . . . fined and refined by an infinite number of grave and learned men, and by long experience grown to such a perfection, for the government of this realm, as the old rule may be justly verified of it . . .: No man out of his own private reason ought to be wiser than the law, which is the perfection of reason.\footnote{COKE \textit{ON Litt.} 97b (1628).}
Coke probably overstates his position,\textsuperscript{250} but one would not expect Coke's infinite number of grave and learned men to create a mere "shibboleth," a useless, "counterproductive" "tautology," as one commentator has called mutuality of obligation.\textsuperscript{251} And indeed, they did not.

\textsuperscript{250} Coke was known for overstatement. See, e.g., Boyer, supra note 248, at 43.

\textsuperscript{251} Murray, supra note 2, at 250.