

ACCEPTANCE OF UNCLEAR OFFERS*

COURTS protect reasonable business expectations by enforcing contracts.¹ These expectations arise when each party is assured that the other will perform his part of the bargain. Under traditional contract doctrine, the offeror can specify when a "deal" is on.² If he asks for a promise, a bilateral contract, both parties are bound as soon as the offeree gives the promise.³ And if the

bility, 16 A.B.A.J. 225 (1930); Hope, *Doctrine of the Family Automobile*, 8 A.B.A.J. 359 (1922).

Statutes require standard provisions in automobile accident insurance policies which provide for coverage of damages caused by any person using the automobile with the owner's permission. The constitutionality of statutes standardizing insurance contracts has long been upheld. *Continental Ins. Co. v. Titcomb*, 7 F.2d 833 (8th Cir. 1925); *Itasca Paper Co. v. Niagara Fire Insurance Co.*, 175 Minn. 73, 220 N.W. 425 (1928).

Recent developments in tort law have also assisted the automobile accident victim in reducing his cause of action to judgment. Examples of this assistance include: "hit and run" statutes, nonresident motorist statutes, judicial alleviation of the harsh effects of contributory negligence, and judicial determinations that violations of defined standards of conduct are negligence *per se* or at least evidence of negligence. See generally KULP, *CASUALTY INSURANCE* (1928); Corstvet, *The Uncompensated Accident and its Consequences*, 3 LAW & CONTEMP. PROB. 466 (1936); James, *supra*, note 25.

**National Dairymen Ass'n v. Dean Milk Co.*, 183 F.2d 349 (7th Cir. 1950).

1. "Wealth, in a commercial age, is made up largely of promises. . . . [The] social interest in the security of transactions . . . requires that we secure the individual interest of the promisee, that is, his claim or demand to be assured in the expectation created, which has become part of his substance." POUND, *AN INTRODUCTION TO THE PHILOSOPHY OF LAW* 236-7 (1922). But see Cohen, *The Basis of Contract*, 46 HARV. L. REV. 553, 573 (1933); Fuller & Perdue, *The Reliance Interest in Contract Damages*, 46 YALE L.J. 52, 59 (1936). See, generally, Llewellyn, *Our Case-Law of Contract*, 48 YALE L.J. 779, 804 (1939); Patterson, *Apportionment of Business Risk Through Legal Devices*, 24 COL. L. REV. 335 (1924); 36 VA. L. REV. 627, 635 (1950); Cohen, *supra*, at 583-5.

2. See generally, *McCrary Stores Corp. v. Goldberg*, 95 N.J. Eq. 152, 122 A. 113 (Ch., 1923); 1 CORBIN, *CONTRACTS* §§ 35, 88 (1951); 1 WILLISTON, *CONTRACTS* § 76 (1936). But see note 5 *infra*.

3. RESTATEMENT, *CONTRACTS* § 52 (1932) (hereinafter cited as RESTATEMENT). But see note 5 *infra*.

This promise need not be received by the offeror. Indeed he may be bound as soon as the offeree mails or telegraphs his acceptance. See, *e.g.*, *Patrick v. Bowman*, 149 U.S. 411 (1893); *L. E. Wertheimer v. Wehle-Hartford Co.*, 126 Conn. 30, 9 A.2d 279 (1939). *Contra*: *Dick v. United States*, 82 F. Supp. 326 (Ct. Cl. 1949), noted 59 YALE L.J. 374 (1950); 62 HARV. L. REV. 1231 (1949); 17 U. CHI. L. REV. 375 (1950). See further Note, 47 HARV. L. REV. 871 (1934); WILLISTON, *CONTRACTS* §§ 81-6 (1936); Llewellyn, *supra* note 1, at 792.

offeror asks for an act⁴ other than a promise, to create a unilateral contract, neither party is bound until the offeree performs.⁵

In *National Dairymen Ass'n v. Dean Milk Co.*⁶ the offeror asked for both a promise and an act. Seller's offer of milk for export required a firm reply, and was also conditioned on Buyer's procuring an export license.⁷ Buyer returned the firm reply, but had not cleared the license when Seller revoked. In Buyer's suit for breach, Seller contended that his offer had requested a unilateral contract, binding neither party until Buyer had satisfied the condi-

4. The term "act" as used in this Note means any bargained-for course of conduct. It includes "action or suffering in reliance, and a performance presumably complex and continuing in character," Llewellyn, *supra* note 1, at 818, as well as simple performances, such as climbing the classroom flagpole or obtaining licenses. In some unilateral contracts, the offeror's duty to perform may be conditioned solely upon performance by the offeree. See *Campbell Investment Co. v. Taylor*, 246 Ill. App. 433 (1927) (offer to assign lease in the event that offeree underwrite amount required to remodel building). In others, the offeror's duty is conditioned not only on the offeree's performance but also on the happening of an event, (a) beyond the parties' control (*e.g.*, in some insurance contracts, the offeror need not perform despite the offeree's premium payments, unless the insured event occurs fortuitously); (b) requiring the cooperation of a third party (*e.g.*, an offer of sale where the offeree must obtain a license); or (c) requiring the offeror's cooperation (*e.g.*, an offer to allow a debt reduction on condition that the offeree repay before the due date, the offer further conditioned on the offeror's accepting tender).

For a general discussion of these types of unilateral contracts, see Note, 33 Col. L. Rev. 463 (1933) and cases cited.

5. For the extent of performance necessary to bind the offeror, see page 1048 *infra*. Performance might not bind the offeror, however, until the offeree gives notice of his acceptance. *Davis Sewing Machine Co. v. Richards*, 115 U.S. 524 (1885). On the other hand, performance might bind an offeror who asked for a promise, *Johnson v. O'Neil*, 182 Minn. 232, 234 N.W. 16 (1931), even though the offeree did not completely perform. *Post v. Frank & Co.*, 75 Misc. 130, 132 N.Y.S. 807 (Sup. Ct. 1917). *Contra*: *Spinney v. Downing*, 108 Cal. 666, 41 P. 797 (1895); *cf. White v. Corlies*, 46 N.Y. 467 (1871) (purchasing and working upon lumber held insufficient indication of acceptance of offer for carpentry employment). And see Goble, *Is Performance Always as Desirable as a Promise to Perform?*, 22 ILL. L. Rev. 789 (1928); Llewellyn, *supra* note 1, at 809, n. 45; Fuller & Perdue, *supra* note 1, at 416.

6. 183 F.2d 349 (7th Cir. 1950).

7. The offer stated: "We are very much interested in helping to feed the nations of Europe who are in dire need of foodstuffs. We offer you 60,000 cases Evaporated Milk for reasonably prompt shipment after confirmed letter of credit has been opened, for \$4.55 per case, F.O.B. factory. . . ."

"This offer is subject to the government's acceptance for export and if a permit is issued for us to ship on above basis, we will try to get you additional quantities at that time. . . ."

"This tender is made with the understanding we are to have a firm reply within two weeks from this date." *National Dairymen Ass'n, Inc. v. Dean Milk Co.*, 183 F.2d 349, 350 (7th Cir. 1950).

Although the offer did not say who had to get the license, both parties clearly understood the duty was Buyer's. See note 11 *infra*. And Buyer did not contend otherwise. *National Dairymen Ass'n, Inc. v. Dean Milk Co.*, 183 F.2d 349, 353 (7th Cir. 1950).

tion.⁸ While Buyer admitted that he had to secure the license before Seller was required to perform, he convinced a majority of the Seventh Circuit that the parties had a bilateral contract the instant he sent a firm reply.⁹

In determining the parties' intent, the court first examined the language of the offer and decided that it clearly called for a promise.¹⁰ To bolster this interpretation it then looked to the parties' actions and concluded that both understood they were bound when Buyer sent the firm reply.¹¹ Even if the

8. Conditions precedent to contract formation have sometimes been called "external." See COSTIGAN, *THE PERFORMANCE OF CONTRACTS* 1-4 (2d ed. 1927). See, generally, Note, *Unilateral Contract Law—An Analysis in Terms of Conditions*, 33 COL. L. REV. 463 (1933); 3 CORBIN, *CONTRACTS* § 628 n.13 (1951); ANSON, *CONTRACTS* § 361 (Corbin's 5th Am. ed. 1930). *Campbell Investment Co. v. Taylor*, 246 Ill. App. 433 (1927). See further Corbin, *Conditions in the Law of Contracts*, 28 YALE L.J. 739 (1919).

9. *National Dairymen Ass'n v. Dean Milk Co.*, 183 F.2d 349, 350 (7th Cir. 1950). Stated another way, Buyer argued that the condition was "internal," Costigan, *op. cit. supra* note 8, and that Seller breached by attempting to withdraw before Buyer had a reasonable time to satisfy the condition. See, generally, *Hoffman v. Employer's Liability Assurance Corp.*, 146 Or. 66, 29 P.2d 557 (1934). Where the court interprets the offer as calling for a bilateral contract, it must then find that the offeree promised, expressly or impliedly, to make all reasonable efforts to perform the "internal" condition. See, e.g., *Wood v. Lucy, Lady Duff Gordon*, 222 N.Y. 88, 118 N.E. 214 (1917). And see Whitney, *Implying a Promise to Establish Mutuality*, 11 ST. JOHN'S L. REV. 51 (1936). If the offeree fails to act diligently within a reasonable time, the offeror may rescind the contract, *Coletti v. Knox Hat Co.*, 252 N.Y. 468, 169 N.E. 648 (1930), or recover damages for offeree's breach. *Nunez v. Dautel*, 19 Wall. 560 (U.S. 1873). And if his remedy at law is inadequate, the offeror might be able to get an injunction to compel the offeree to satisfy the condition. See, e.g., *Watson Bros. Transportation Co. v. Jaffa*, 143 F.2d 340 (8th Cir. 1944) (vendor of operating rights on interstate trucking routes required to execute forms necessary for ICC approval of the sale); *Lennon v. Habit*, 216 N.C. 141, 4 S.E.2d 339 (1939), noted in 18 N.C.L. REV. 135 (1940).

10. *National Dairymen Ass'n, Inc. v. Dean Milk Co.*, 183 F.2d 349, 352 (7th Cir. 1950).

11. The court's language, however, indicates that it was very much bothered by the evidence. Two days before sending his firm reply, Buyer stated in a letter that he was trying to clear the export license. According to the Seller, Buyer therefore understood that the offer required a license before a contract could exist. But to the court it seemed "equally reasonable" that Buyer "was investigating the possibilities of procuring the government's acceptance for export before [Buyer] would, by its reply, bind itself to perform." *Id.* at 353 (emphasis added).

And a day after Buyer sent his firm reply, Seller wired that he could ship milk promptly, saying "must have letter credit apply against railroad bills of lading also export permit license before loading." The court felt that "[t]his language would indicate that the [Seller] considered the letter of credit and the export license as being in the same category, as conditions precedent to [Seller's] performance" of a bilateral contract. Seller contended, however, that when he sent this telegram, he believed that the Buyer had already obtained an export license and that a unilateral contract therefore existed. The court rejected this contention, stating that Buyer "just two days prior to its acceptance had only said that it was 'trying to have a few export licenses cleared.' It would have been just as reasonable to have concluded that instead of obtaining the

offer were unclear, reasoned the court, Section 31 of the Restatement of Contracts, with its preference for a promissory acceptance,¹² called for a bilateral contract to afford both parties optimum protection by binding them as soon as possible.¹³

The language of the offer, however, was a poor criterion for determining that the parties bargained for mutually binding promises. On its face it was so equivocal that one of the three judges came to the opposite conclusion.¹⁴ And export buyers and sellers who were asked to interpret this offer revealed sharp disagreement.¹⁵

The basic fallacy of the *Dean* approach is the assumption that businessmen always bargain in terms of acts or promises.¹⁶ When they do so clearly, the act-promise approach may be adequate. But where the offer is ambiguous¹⁷ or where it asks for both a promise and an act, the traditional dichotomy affords little help in determining the parties' intent.

export licenses the [Buyer] had learned that, if and when [he] contracted for the purchase of the milk [he] would be able to procure the export licenses." *Id.* at 353-4 (emphasis added).

12. Section 31 reads as follows: "In case of doubt it is presumed that an offer invites the formation of a bilateral contract by an acceptance amounting in effect to a promise by the offeree to perform what the offer requests, rather than the formation of one or more unilateral contracts by actual performance on the part of the offeree."

13. *Id.* at 353. According to Holmes, C.J.: "There is the strongest reason for interpreting a business agreement in the sense which will give it legal support, and such agreements have been so interpreted." *Martin v. Meles*, 179 Mass. 114, 117, 60 N.E. 397, 398 (1901). See also, 3 CORBIN, CONTRACTS § 635 (1951); Whitney, *Implying a Promise to Establish Mutuality*, 11 ST. JOHN'S L. REV. 51 (1936).

14. *National Dairymen Ass'n v. Dean Milk Co.*, 183 F.2d 346, 355 (7th Cir. 1950).

15. The following hypothetical offer, patterned after the *Dean* offer, see note 7 *supra*, was submitted to export sellers and buyers in ten cities:

"We are interested in feeding needy European nations. We offer you a thousand cases of condensed milk at \$6 a case. This offer is subject to government approval for export, and it is made with the understanding that we are to have a firm reply within two weeks from this date."

The results were as follows:

- (a) Twenty-seven businessmen thought that a firm reply would bind the parties;
- (b) thirteen felt that a firm reply would be insufficient and that the parties would be free to withdraw until procurement of the license; and
- (c) six would not act at all unless the offer were clarified.

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16. According to Professor Llewellyn, businessmen bargain for neither promises nor acts. Instead, they "think in terms of giving and getting agreement by an offeree. Agreement, or agreeing, includes assent: *getting* agreement includes also getting assurance, getting commitment for the future." Llewellyn, *supra* note 1, at 794.

17. *E.g.*, A says to B, "I will pay \$100 to you if you plow Blackacre for me." B replies, "Okay." According to Llewellyn, *supra* note 1, at 786, 804, ambiguous offers are customary in business transactions.

Where the offer is unclear, a more realistic approach would determine when the parties were assured of a deal by investigating the actions and circumstances surrounding their negotiations.¹⁸ In many cases such an examination may be sufficient to determine the parties' reasonable expectations. If the evidence is inadequate, however, courts should go further and investigate how businessmen typically close this type of bargain.¹⁹

In this particular case, the *Dean* court may have gone far enough in not looking beyond the actions of Buyer and Seller. Nevertheless its evaluation of the evidence seemed to have been influenced by Section 31's preference for bilateral contracts.²⁰ And even if this court avoided that pitfall, other courts may curtail inquiry into the parties' intent, believing that a bilateral contract more fully protects reasonable expectations.²¹

18. Although the court looked to the circumstances surrounding the *Dean* transaction, see note 11, *supra*, it did not look to the underlying purpose of the contract as evidence of intent. For example, if the prime motive for the *Dean* offer, as communicated to the offeree, see note 7 *supra*, were to ship milk to Europe, see Brief for Appellants, p. 30, the court might have concluded that the Seller did not want to obligate himself to any particular buyer until assured that the milk was acceptable for export. For the view that extrinsic evidence should always be admitted to help interpret unclear language, see Greene, *Theories of Interpretation in the Law of Contracts*, 6 U. OF CHI. L. REV. 374 (1934).

Courts have, in fact, looked beyond the language of an unclear offer for evidence of the parties' intent. See *Senter v. Senter*, 87 Ohio. St. 377, 101 N.E. 272 (1913); note 11 *supra*. Where they have, however, their search has been limited to finding an "act" or a "promise." That this approach may not conform to business usage, see note 16 *supra*.

19. "[P]arties may contract with reference to a custom known to both, and then proof of the custom may explain and make definite a writing otherwise vague and of doubtful meaning." *Stulsaft v. Mercer Tube & Mfg. Co.*, 288 N.Y. 255, 260, 43 N.E.2d 31, 33 (1942); *accord*, *Illsley v. Peerless Motor Car Co.*, 195 Ill. App. 572 (1915). And see RESTATEMENT § 249, illustration 3 (usage "operative" to determine when parties are bound).

The studies of Underhill Moore show a definite correlation between judicial decisions and business usage. According to his "institutional" analysis, courts find implied in fact contracts in order to honor business expectations. See Kessler & Sharp, forthcoming casebook on Contracts, ch. VII, and treatises cited therein.

On introducing evidence of business practice to clarify ambiguous language, see FULLER, BASIC CONTRACT LAW 415-18 (1947).

20. Indeed, the evidence seemed to be in equipoise. See note 11 *supra*. See also *Woodbine v. Van Horn*, 29 Cal. 2d 95, 173 P.2d 17 (1946); *Eastern Paper Box Co. v. Herz Mfg. Corp.*, 323 Mass. 138, 80 N.E.2d 484 (1948).

21. See, *e.g.*, *Friedman v. Decatur Corp.*, 135 F.2d 812 (D.C.Cir. 1943) (limiting inquiry to language); *Bandoni v. Walston*, 79 Cal. App.2d 178, 179 P.2d 365 (1947) (unclear offer to be interpreted "as contemplating a bilateral rather than a unilateral contract"); *Bridges-Wilson Corp. v. University Contracting Co.*, 314 Mass. 257, 49 N.E.2d 896 (1943) (limiting inquiry to language); *Martindell v. Fiduciary Counsel, Inc.*, 131 N.J.Eq. 523, 26 A.2d 171 (Ch. 1942) (same).

If this is so, courts may be using Section 31 to deny parties a free choice in determining when they are bound because traditional unilateral contract doctrine does not afford adequate protection. Under Section 45 an offeror may revoke his offer for a unilateral contract any time before "part performance" by the offeree—*i.e.*, before the offeree has begun to perform or has substantially performed.²² In some cases, then, short of the point where the offeror is bound the offeree is apt to be diligently expending money in the belief that the offeror will give him a chance to perform.²³ Nonetheless, if the offeror does revoke, the offeree gets nothing even though his expenditures were induced by the offer.²⁴ On the other hand, part performance entitles the offeree to the full benefit of the

22. According to RESTATEMENT § 45, "if an offer for a unilateral contract is made, and part of the consideration requested in the offer is given or tendered by the offeree in response thereto, the offeror is bound by a contract, the duty of immediate performance of which is conditional on the full consideration being given or tendered within the time stated in the offer, or, if no time is stated therein, within a reasonable time."

According to Fuller & Perdue, *supra* note 1, at 410 n.206, § 45 intends to bind the offeror as soon as the offeree begins to act. And there are cases supporting this view. See cases cited in RESTATEMENT, CONTRACTS, TEX. ANNOT. § 31. But other courts have required a more substantial performance. *E.g.*, *Bretz v. Union Central Life Ins. Co.*, 134 Ohio St. 171, 16 N.E.2d 272 (1938) (making survey, preparing abstract, and incurring expenses held merely "preparatory" to compliance with offer.)

23. In fact, this reliance may be one of the bases for the "part performance" doctrine itself. According to RESTATEMENT § 45, comment b, "the main offer includes as a subsidiary promise, necessarily implied, that if part of the requested performance is given, the offeror will not revoke his offer, and that if tender is made it will be accepted." See *McGovney, Irrevocable Offers*, 27 HARV. L. REV. 644, 654 (1914); *Hutchinson v. Dobson-Bainbridge Realty Co.*, 31 Tenn. App. 490, 217 S.W.2d 6 (1946); Fuller and Perdue, *supra* note 1, at 413 n.211. For the view that this collateral offer is based on custom, see Whittier, *The Restatement of Contracts and Mutual Assent*, 17 CALIF. L. REV. 442, 450 (1929). See, further, Note, 10 CORNELL L. Q. 220 (1925), and note 26 *infra*. For another basis, see note 28 *infra*.

24. RESTATEMENT § 45, comment a; *Bretz v. Union Central Life Ins. Co.*, *supra* note 22. For a slightly different situation, see Fuller and Perdue, *supra* note 1, at 417: "[W]here a promise is expressly made revocable, or is understood as a matter of business practice to be revocable, the expectancy created by it may be regarded as too insecure to make reasonable the promisee's reliance on it." *But cf.* *G. Ober & Sons Co. v. Katzenstein*, 160 N.C. 439, 76 S.E. 476 (1912), discussed in 1 WILLISTON, CONTRACTS § 60AA n.4 (1936), and Fuller and Perdue, *supra* note 1, at 412 n.209, 415 n.217; note 28 *infra*.

An offeree might recover, however, on a promissory estoppel theory if he can prove that the offeror carelessly induced the offeree to rely detrimentally on the offer. See RESTATEMENT § 90; Whittier, *supra* note 23, at 442-3; Note, 33 COL. L. REV. 463, 465 n.11 (1933). If the offeree is successful, he recovers the benefit of the bargain. *Ricketts v. Scothorn*, 57 Neb. 51, 77 N.W. 365 (1898); MUELLER, CONTRACT IN CONTEXT 109 (1951). But promissory estoppel may be difficult to prove. See *Fried v. Fisher*, 328 Pa. 497, 503, 196 Atl.39, 43 (1938). Moreover, courts have not indicated a willingness to invoke the doctrine in business contexts. See Note, 9 U. OF CHI. L. REV. 153 (1941); *Allegheny College v. National Chatauqua County Bank of Jamestown*, 246 N.Y. 369, 159 N.E. 173 (1927).

bargain—expectation damages.²⁵ Yet the offeror may have no way of binding the offeree to completion.²⁶

In an effort to protect the parties, Section 31 may be over-compensating the offeree. Where he has expended short of substantial "part performance," no reason appears for giving him the full benefit of the bargain by calling the deal a bilateral contract. A more equitable approach would compensate the offeree in reliance damages to the extent of his actual out-of-pocket expenditures.²⁷ And there is no reason for confining this rule to the unclear offer situation; rather it should be extended to cover all unilateral contracts.

On the other hand, where the offeree *has* substantially performed, he is entitled to expectation damages from the offeror. By the same token, at that point he should become liable for expectation damages.

With these changes in damages law, courts faced with unclear offers would be less anxious to bind the parties as soon as possible to a bilateral contract. At the same time they will be more willing to explore fully the parties' intent. Courts may still feel that a Section 31 type of presumption is necessary because

25. Fuller & Perdue, *supra* note 1, 410-11. But the offeree may have to show that he would have complied with the terms of the offer. See STEFFEN, CASES ON THE LAW OF AGENCY 62 (1933), and cases cited; RESTATEMENT § 45, illustration 1. He is then entitled to the contract price less the cost of completing performance. McCORMICK, HANDBOOK ON THE LAW OF DAMAGES 585, 587 (1935), and cases cited. Or he may treat the contract as rescinded and sue in quantum meruit for the value of his part performance to the offeror. *Id.* at 586; Clark v. Mayor of New York, 4 N.Y. 338, 343 (1850).

26. See Fuller & Perdue, *supra* note 1, at 411; Note, 26 HARV. L. REV. 274 (1913). But some courts have said that an offeree by part performance impliedly promises to complete performance and thereby binds both parties to a bilateral contract. See Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 658, 67 P. 1086, 1088 (1902); Plumb v. Campbell, 129 Ill. 101, 107, 18 N.E. 790, 792 (1888); cases cited in RESTATEMENT, CONTRACTS, TEX. ANNOT. § 31. In the foregoing cases, however, the offeree was the plaintiff. But see Kling Bros. Engineering Works v. Whiting Corp., 320 Ill. App. 630, 637, 51 N.E.2d 1004, 1008 (1943).

27. Holding the revoking offeror liable to reimburse the offeree's reliance is an "obvious" compromise between two harsh extremes: (a) enforcing the offeror's power to revoke any time before his offer is accepted in exactly the manner he prescribed, and (b) protecting the offeree by allowing him to bind the offeror to the full bargain without being bound in the least himself. This result in effect recognizes "a power of revocation qualified by what is approximately the duty of reimbursing reliance." See Fuller & Perdue, *supra* note 1, 410-1, 414. See, further, *id.* at 414-7 and cases cited, showing that such a result has already been recognized by courts.

The Civil Law doctrine of *culpa in contrahendo* reimburses the offeree for all losses actually sustained by him in consequence of his reliance on the offer. 1 WILLISTON, CONTRACTS § 63A (1936). For the suggestion that the offeror should be held liable to this extent for inducing the offeree to begin performance and then revoking, see cases cited 1 *id.* § 60AA n.4. See also discussion in Fuller & Perdue, *supra* note 1, at 411 n.208. See further, CORBIN, CASES ON THE LAW OF CONTRACTS 177 (3d. ed. 1947).

extrinsic evidence of intent may present difficult fact questions.²⁸ But such cases may be few.²⁹ And the prospect of difficult cases is no reason for using a presumption in all cases. Moreover, determining intent in contract cases presents no greater difficulty than similar intent questions in other fields of law. Above all, any difficulties will be outweighed by the desirability of safeguarding business expectations.

28. Indeed, "part performance" may be explained in terms of assurance. See Llewellyn, *supra* note 1, at 818: "[T]he promisee's conduct will gain especial importance on the barring of revocation as it comes to give factual assurance that the desired performance will be completed." And assurance of a deal may also have been in the minds of courts that have implied a promise on the part of the offeree to complete performance, thereby binding both parties to a bilateral contract. See cases cited note 26 *supra*. Moreover it may explain why some courts require a substantial performance before binding the offeror under § 45, see note 22 *supra*, and why, for example, in brokerage cases the principal is bound the instant his agent acts upon the offer of a commission. In any event, binding both parties to a contract when each is reasonably assured that the other will perform is not a radical departure from existing case-law.

29. See, *e.g.*, *Bandoni v. Walston*, 79 Cal. App. 2d 178, 179 P.2d 365 (1947) and *Woodbine v. Van Horn*, 29 Cal.2d 95, 173 P.2d 17 (1946) where § 31 was apparently used to resolve a conflict in evidence.

But prior to § 31, the rule in one state was against a presumption that the offer invites a bilateral contract. *Mott v. Jackson*, 172 Ala. 448, 55 So. 528 (1911). In other states, courts leaned toward finding a bilateral contract where the offer was unclear, but did not expressly recognize a presumption. See, generally, cases cited in annotated editions of RESTATEMENT § 31.