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Exceptions to Consideration Requirement  
In California  

By JAMES B. SMITH*  

CONSIDERATION IS necessary to make a promise binding, to modify a binding promise, or to discharge a binding promise upon modified terms; in brief to create, modify or discharge a contract.¹ Exception is made in each case, and this article attempts to compile the California exceptions.

I. EXCEPTIONS WITH REGARD TO ENFORCEMENT OF PROMISES

This section may be divided into three parts: (1) Enforcement of promises because of detrimental reliance; (2) the special rule of Drennan v. Star Paving Co.; and (3) enforcement of promises because of moral obligation. The last, though a theory of consideration, is sufficiently exceptional to warrant discussion.

A. Detrimental Reliance

Doctrine and Difficulties

The rule of Restatement section 90 is familiar to all.² It attempts to substitute a more satisfactory doctrine for that of "promissory estoppel." Promissory estoppel is a true term of art, however, and the California courts have transferred it to Restatement section 90, as the label therefor.³ It will be used freely in this article and interchangeably with language of detrimental reliance.

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¹ For a comprehensive review of the subject of consideration and a comparison of the civil and common law requirements, see Cause and Consideration, 47 CALIF. L. REV. 74 (1959). See also On the Complexity of Consideration, 41 COLUM. L. REV. 777 (1941).

² RESTATEMENT, CONTRACTS § 90 (1932): "A promise which the promisor should reasonably expect to induce action or forbearance of a definite and substantial character on the part of the promisee and which does induce such action or forbearance, is binding if injustice can be avoided only by enforcement of the promise."

Like all reforms Restatement section 90 has its faults, two of which bear discussion.

One is the failure of the draftsman to indicate how far the section promises are to be considered part of the total scheme of the Restatement. Unlike other major sections of the Restatement, section 90 has no comments although it was destined to be controversial. While this avoids rigidity, it leaves ambiguity. Thus we have the question of whether the third party beneficiary rules apply to section 90 promises so as to permit protection of third persons who rely on promises. While they permit of application, one is not satisfied, without it being spelled out, that they are intended to apply.

The other is its recognition of but one degree of injustice, that which requires enforcement of the promise. This appears to exclude relief in those cases in which the promisee has suffered damage by virtue of reliance on the promise but not to such an extent as to call for specific enforcement, cases in which the appropriate relief would be an award of damages sufficient to save the promisee from loss. Professor Corbin has it that “enforcement” of a promise may include such relief, but does not find that section 90 permits it.

If in fact relief cannot be given under section 90 in these cases, then section 90 seems destined to become but part of the eclectic
process which it was designed to displace.

**Particular Applications**

California has made the routine applications of the doctrine of promissory estoppel discussed in this section.

1. **Charitable Subscriptions**

While promissory estoppel applies to charitable subscriptions, most of the cases have been decided on a consideration theory. Where the subscription calls for a specific sum to be raised for a specific purpose and is executed "... in consideration of others subscribing," the reciprocal promises of the other subscribers afford "... a well-recognized consideration." Where the donation is to be devoted to a particular purpose and is accepted with that condition attached, an obligation is incurred by the charity which "... will satisfy the requirements of a consideration." Where individual subscriptions were used to induce pledges from foundations, "... this was consideration" for the individual subscriptions. The charity may in each instance enforce the subscription as a third party donee beneficiary.

The case of the permanent charity seeking to enforce the ordinary subscription has not arisen; for example, of United Crusade seeking to enforce a twenty-five dollar pledge. It can be said that such a charity incurs liability from one moment to the next on the strength of pledges then in hand and therefore can enforce all pledges on grounds of promissory estoppel.

2. **Promised Gifts of Land**

A promised gift of land has been enforced where the promisee has made valuable improvements. It has been suggested that other things such as transplantation of self and family to a new area, coupled with sacrifice of other opportunities, would suffice.

3. **Pensions and Bonuses**

Where an employer has a fixed pension plan and the employee continues in employment with knowledge of it, the pension can be

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9 Id at 49, 283 Pac. at 953.
11 Ibid.
enforced on the contract theory that the employer impliedly offers the employee salary and bonus for continued services which the employee accepts by continuing in employment.\textsuperscript{14}

The litigated cases, however, have been ones in which the waters have been muddied in some way such that the courts have preferred to rely on estoppel, promissory or equitable, or both, or on a combination of estoppel and consideration.\textsuperscript{15} In the leading case of Hunter v. Sparling,\textsuperscript{16} for example, the promisee worked throughout his life for a Japanese banking concern which had a retirement plan which paid substantial lump sum benefits. He was assured that he would receive them and from time to time learned some but never the full details of the plan. The bank was placed in conservatorship upon the outbreak of World War II, at a time when payment of benefits was due. The benefits were held collectible. The court said that while recovery could be had on the contract theory outlined above, it need not be predicated solely on that theory and could be placed upon the ground of promissory estoppel as well.

Contract and detrimental reliance were made companion grounds for recovery of a 4,000 dollar bonus in Frebank Co. v. White\textsuperscript{17} where, in mid-year, an employer, to enable his employee to get a home loan, furnished the lender with a statement indicating that the employee would get a bonus of at least 4,000 dollars for the year.

4. Gratuitous Undertakings; Promises to Obtain Insurance for Another

Graddon v. Knight\textsuperscript{18} involved the stock problem in this area, the promise to obtain insurance for another. A bank which was financing a home purchase volunteered to get fire insurance for the buyer. It failed to do so and the house burned down. The defense was that it would violate the parol evidence rule to permit evidence of the bank's promise because the deed of trust required the buyer to obtain insurance. As to this defense, it was held that the bank's promise was not in contravention of, but merely collateral to, the written contract (the deed of trust), that it was merely an agreement by which the bank became the buyer's agent to procure insurance. The court then relied on Restatement section 90 to impose liability on the bank for failure


\textsuperscript{16} Supra note 14.


to fulfill its promise. The Restatement of Agency prescribes an agency-neglect of duty approach.¹⁹

Cases involving gratuitous promises to insure have invariably been cases in which the promisor has been motivated by a selfish interest, either a desire to protect his own interest in property as in the Grad-don case, or a desire to cultivate business good will of the promisee. This would create justification for reliance on the promise. Given a case in which the promise was made purely as an accommodation, the Restatement of Agency would still impose liability,²⁰ but one feels that courts might be prepared to draw a line at this point.

5. Promises Not to Enforce Liens

The classic case of the mortgagor who makes improvements in reliance on a promise not to enforce the mortgage for a specific period of time²¹ has not appeared in California, but it is clear that such a promise would be enforced.²² Wade v. Markwell & Co.²³ holds in effect that the creditor is estopped to foreclose when he has led the debtor to believe that payment will not be required until demand is made, and as a necessary incident that the creditor is estopped to rely on the rule of Civil Code section 1698.²⁴

6. Other Applications

Among other types of promises to which the doctrine of estoppel has been applied and to which the doctrine of promissory estoppel would be applicable are promises to give or not revoke licenses which have induced expenditures, and promises not to plead the statute of limitations.²⁵

B. Rule of Drennan v. Star Paving Co.

Promises are bargain promises or non-bargain promises. Consideration is the ground, and should be the sole ground, for the enforce-


²⁰ RESTATEMENT (SECOND), AGENCY § 378, illustration 2 (1958).


²³ Supra note 22.

²⁴ CAL. CIV. CODE § 1698: A contract in writing may be altered by a contract in writing, or by an executed oral agreement, and not otherwise.”

ment of the first. The doctrine of detrimental reliance was conceived to permit enforcement of the second. To apply promissory estoppel to a promise contemplating an exchange is to deprive a party of his right of freedom of contract; of his right to condition his promise upon a specific exchange.\textsuperscript{26}

These principles become severely tested in the field of sub-bids. General contractor asks bids from subcontractors, makes his general bid from a composition thereof and wins the job, after which one of the subcontractors attempts to revoke. If we apply the theories which have been advanced, the subcontractor can do so. The general contractor must bind the sub-bid by contract conventions before he makes his general bid, if he is to be safe. This, of course, he can do by requiring that each sub-bid be reduced to a bilateral contract in which he promises to use it if it proves the lowest and to award the job to the subcontractor if he wins the general bid. But to impose such a requirement is to impose a clog upon industry, and the modern attitude, as shown by present day advocacy of firm offer statutes,\textsuperscript{27} is to free business of such clogs.

Into such a setting came the sub-bid case of \textit{Drennan v. Star Paving Co.}\textsuperscript{28} In the leading case of \textit{James Baird Co. v. Gimbel Bros.}\textsuperscript{29} it had been held that the sub-bid was revocable. In what was apparently an effort to avoid applying promissory estoppel directly to a bargain promise while at the same time applying it to a situation of the type at hand, the court in \textit{Drennan} engaged in this rationalization: Where a promise is made for an act (\textit{i.e.}, there is an offer for a unilateral contract), Restatement of Contracts section 45 implies a subsidiary promise not to revoke a main promise (the offer) once performance of the act is

\textsuperscript{26} James Baird Co. v. Gimbel Bros., 64 F.2d 344 (2d Cir. 1933). \textit{1} \textsc{Corbin, op. cit. supra} note 3, § 200, at 658.

\textsuperscript{27} See \textit{Uniform Commercial Code}, § 2-105: "An offer by a merchant to buy or sell goods in a signed writing which by its terms gives assurance that it will be held open is not revocable, for lack of consideration, during the time stated or if no time is stated for a reasonable time, but in no event may such period of irrevocability exceed three months." N.Y. \textit{Real Property Law}, Part 2, § 294(4): "When hereafter an offer to enter into a contract is made in a writing signed by the offeror, or by his agent, which states that the offer is irrevocable during a period set forth or until a time fixed, the offer shall not be revocable during such period or until such time because the absence of consideration for the assurance or irrevocability. When such a writing states that the offer is irrevocable but does not state any period of time of irrevocability, it shall be construed to state that the offer is irrevocable for a reasonable time." In California, local ordinance may make bids on public works irrevocable for some period of time. See, \textit{e.g.}, M. F. Kemper Constr. Co. v. City of Los Angeles, 37 Cal. 2d 696, 235 P.2d 7 (1951).


\textsuperscript{29} \textit{Supra} note 26.
begun. Section 45 makes such part performance consideration for the subsidiary promise. It suggests that detrimental reliance may also make the subsidiary promise binding. Analogizing, it can be said that where, as in the sub-bid situation, there is an offer for a bilateral contract, a subsidiary promise not to revoke the main promise (the offer) can be implied once action is taken which the promise was designed to induce. One is satisfied with the result.

A difficulty with the reasoning is that, in order to bring the concept of Restatement section 90 to section 45's subsidiary promise, the court relies on the last sentence of Comment b to section 45 which is as follows, with emphasis added: "Part performance (furnishes) consideration for the subsidiary promise. Moreover, merely acting in justifiable reliance on an offer may in some cases serve as a sufficient reason for making a promise binding (see § 90)." This seems intended only to call attention to section 90, not correlate the sections, and this most vital link in the chain of the court's rationale is its weakest.

The court had been faced with the problem of whether promissory estoppel could be applied to a bargain promise in the earlier, troublesome case of *Bard v. Kent* where it had denied such application. Its reconciliation of that case seems to indicate a generally softened attitude. In the *Bard* case a lessee desired renewal of the lease. He was prepared to make valuable improvements, which the lessor desired. She suggested he have an architect prepare plans. She then executed an option to renew which recited that it was for a consideration of ten dollars. This was never paid. After the lessee had spent money on an architect, the lessor died. It was held that the expenditure could not be consideration for the lessor's promise (the option) because ten dollars, not the expenditure, had been bargained for that promise. The lessee had not pleaded estoppel but sought to rely on it, to which the court answered:

There must . . . be a promise on which reliance may be based. . . . Defendant did not plead the issue of promissory estoppel at the trial, and there is nothing in the record to show that . . . [the lessor] at any time promised to keep the option open or made any other

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30 Restatement, Contracts § 45 (1932): "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."

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. . . ."


32 Id at 453, 122 P.2d at 10, 139 A.L.R. 1035.
promise on which defendant could rely. She merely made without consideration an offer, which was never accepted, to renew the lease.

In the Drennan case, the Bard case is reconciled with the statement that "... it does not appear that the offeree's reliance was 'of a definite and substantial character' so that injustice could be avoided 'only by the enforcement of the promise'". This infers that in the final analysis it was only the insubstantiality of the lessee's action in reliance on the option that was fatal and that in another Bard case, with estoppel pleaded and more substantial action taken, another result might be obtained. It is interesting to note that if the subsidiary promise concept were applied to the Bard option we would have a promise to keep a promise (the subsidiary promise) to keep a promise (the option).

C. Moral Obligation

It was the common law rule that moral obligation would support a promise only if it arose out of a pre-existing legal obligation. Civil Code section 1606 provides that "... a moral obligation originating in some benefit conferred upon the promisor or prejudice suffered by the promisee, is ... a good consideration for a promise, to an extent corresponding with the extent of the obligation." In Estate of McConnell this was held to be nothing more than a codification of the common law rule. Except for the real estate commission cases, infra, this continued to be the state of the California law until Desny v. Wilder.

Ex-Legal Obligations

As indicated, moral obligation surviving a legal obligation will support a promise to satisfy the latter. This of course is the promise to pay a debt barred by the statute of limitations or discharged in bankruptcy.

Where the bar is the statute of limitations, most states, including California, require a written promise or acknowledgment. Earlier California cases indicated that an acknowledgment had to contain an affirmative expression of willingness to pay. Based upon re-examination of these cases, it was held in Western Coal & Mining

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33 51 Cal. 2d 409, at 417, 333 P.2d 757, at 761.
34 6 Cal. 2d 493, 58 P.2d 639 (1938).
36 Restatement, Contracts § 86, comment a (1932). Cal. Code Civ. Proc. § 360. As to distinctions between promises or acknowledgments made before and after the statute runs, see 1 Witkin, California Procedure Actions § 169 (7th Ed. 1990).
37 See cases reviewed in Western Coal & Mining Co. v. Jones, 27 Cal. 2d 819, 167 P.2d 719 (1946).
Co. v. Jones\(^{38}\) that the rule in fact was merely that there could not be an expression of unwillingness to pay.

Where the bar is discharged in bankruptcy there is no requirement of a writing,\(^{39}\) but Restatement of Contracts, section 87 requires a promise in this instance,\(^{40}\) and California has not decided otherwise.

The promise or acknowledgment must be communicated to the creditor or to a person who may be treated as his agent or representative to receive it.\(^{41}\)

**Benefits Conferred in Expectation of Compensation**

It is said that a growing body of case law supports the view that moral obligation is sufficient to sustain a promise to reward benefits conferred in expectation of compensation under circumstances which do not permit recovery in contract.\(^{42}\) A more precise statement of the rule is to be found in the excerpts from Desny v. Wilder,\(^{43}\) which is the first California case to recognize it.

The cases offered in support of the proposition seem to be almost entirely of two types, neither of which really supports it: cases in which the promisor was or should have been on notice that the benefit was conferred in expectation of compensation, in which case acceptance of the benefits ought to create a contractual obligation; and cases which traditionally have been dealt with in quasi-contract such as those involving involuntary bailsments and those involving physicians rendering services to unconscious persons at the scene of an accident.\(^{44}\)

Nevertheless the "rule" is being accepted, as witness Desny v. Wilder, and by acceptance given credence.

In California, intermediately between the cases recognizing moral obligation only if it arises out of legal obligation and Desny v. Wilder, lie real estate commission cases in which it has been held that a written agreement to pay for brokerage services is supported by the moral obligation to do so, where commissions were originally uncollectible.

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\(^{38}\) Id.

\(^{39}\) Lambert v. Schmalz, 118 Cal. 33, 50 Pac. 13 (1897). Restatement, Contracts § 87 (1932).

\(^{40}\) See 1 Williston, op. cit. supra note 21, § 158, at 657, where the author states that mere acknowledgment or part payment is "not sufficiently clear."


\(^{42}\) Annot., 8 A.L.R. 2d 798 (1949).

\(^{43}\) 46 Cal. 2d 715, 299 P.2d 257 (1956).

\(^{44}\) See cases collected in Annot., 8 A.L.R. 2d 798 (1949). Restatement, Contracts §72 (1932).
for lack of a writing. But, as has been pointed out, these can be dealt with on the basis that the subsequent writing merely removes the bar of the statute of frauds, thus vitalizing what was otherwise a valid contract.

*Desny v. Wilder* was an appeal from an order denying a motion to set aside a summary judgment. Plaintiff's deposition, treated as an affidavit in opposition to the motion for summary judgment, told this story: He called defendant's office asking for an appointment with defendant. Defendant's secretary insisted he disclose his purpose. He then told her the substance of an idea he had for a movie. He did not remember whether he said anything about sale of the idea in this conversation. (This is a key point in the testimony since it indicates that in the first instance the idea was "blurted out," as the court describes in the excerpt below.) Defendant's secretary advised that it would be difficult to get an appointment with defendant. Plaintiff then asked leave to send defendant a sixty-five page synopsis of the story which he had prepared. The secretary protested that defendant would not read this and that it would have to be cut down to three or four pages. Two days later plaintiff called to advise that such a summary was ready. He was requested to read it to the secretary so she could take it down in shorthand, after which she promised to present it to defendant. In this conversation, if not previously, plaintiff stated that it was his purpose to sell the idea to defendant and that he expected to be paid for it if it were used. The secretary assured him that he would be. The next thing he knew the idea appeared as a movie and he was never paid for it. Plaintiff's action was for 150,000 dollars as the reasonable value of the idea.

The court's function on such an appeal is to determine if it appears that there is a triable issue. If so a summary judgment is to be reversed. In this connection the court reasoned thusly: (a) Disclosure of an idea can be the subject of a bargain but the bargain must be struck before the idea is disclosed. (b) If the idea is disclosed voluntarily—blurted out—it ceases to be able to serve as a consideration. (c) However if, after voluntary disclosure, the discloser signifies that he intends sale of the idea, and the disclosee, with knowledge of such fact, accepts implementation (the summary of the synopsis), a con-

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tract by conduct results with respect to the value of the implementa-
tion. To this extent at least, said the court, a triable issue is made to
appear. This assumes that the secretary can be found to have acted
as agent of the defendant in all respects.

What is important for our purposes however is the court's state-
ment that if, after voluntary disclosure, there is an express promise
to pay for the idea, the promise can be enforced.

The court's thinking on both points is found in this excerpt from
the opinion:48

... [C]onveyance of an idea can constitute valuable consideration
and can be bargained for before it is disclosed to the proposed pur-
chaser, but once it is conveyed, i.e., disclosed to him and he has
grasped it, it is henceforth his own and he may work with it and
use it as he sees fit. In the field of entertainment the producer may
properly and validly agree that he will pay for the service of con-
veying to him ideas which are valuable and which he can put to
profitable use. Furthermore, where an idea has been conveyed with
the expectation by the purveyor that compensation will be paid if
the idea is used, there is no reason why the producer who has been
the beneficiary of the conveyance of such an idea, and who finds it
valuable and is profiting by it, may not then for the first time, al-
though he is not at that time under legal obligation so to do, promise
to pay a reasonable compensation for that idea—that is, for the past
service of furnishing it to him—and thus create a valid obligation. As
said in 12 American Jurisprudence 603, section 110, “there is con-
siderable authority which supports the view that the moral obligation
arising from a benefit of a material or pecuniary nature conferred
upon the promisor by past services, rendered in the expectation that
they were to be paid for—or, at least, if rendered upon the assumption
by the person rendering them, though mistaken, that they would cre-
ate a real liability—and otherwise, in circumstances, creating a moral
obligation on the part of the promisor to pay for the same, will sup-
port an executory promise to do so, although there was, previous to
such promise, no legal liability or promise, perfect or imperfect.” . . .
But, assuming legality of consideration, the idea purveyor cannot
prevail in an action to recover compensation for an abstract idea
unless (a) before or after disclosure he has obtained an express
promise to pay, or (b) the circumstances preceding and attending
disclosure, together with the conduct of the offeree acting with
knowledge of the circumstances, show a promise of the type usually
referred to as “implied” or “implied-in-fact.” . . . That is, if the idea
purveyor has clearly conditioned his offer to convey the idea upon
an obligation to pay for it if it is used by the offeree and the offeree,
knowing the condition before he knows the idea, voluntarily accepts
its disclosure (necessarily on the specified basis) and finds it valuable

48 Id. at 737-739, 299 P.2d at 269. The writer is advised by counsel in the case
that it was settled.
and uses it, the law will either apply the objective test . . . and hold that the parties have made an express (sometimes called implied-in-fact) contract, or under those circumstances, as some writers view it, the law itself, to prevent fraud and unjust enrichment, will imply a promise to compensate. [Emphasis added.]

Such inferred or implied promise, if it is to be found at all, must be based on circumstances which were known to the producer at and preceding the time of disclosure of the idea to him and he must voluntarily accept the disclosure, knowing the conditions on which it is tendered. Section 1584 of the Civil Code . . . can have no application unless the offeree has an opportunity to reject the consideration—the proffered conveyance of the idea—before it is conveyed. Unless the offeree has an opportunity to reject the consideration—the proffered conveyance of the idea—before it is conveyed he cannot be said to accept . . . The idea man who blurts out his idea without having first made his bargain has no one but himself to blame for the loss of his bargaining power. The law will not in any event, from demands stated subsequent to the unconditioned disclosure of an abstract idea, imply a promise to pay for the idea, for its use, or for its previous disclosure. The law will not imply a promise to pay for an idea from the mere facts that the idea has been conveyed, is valuable, and has been used for profit; this is true even though the conveyance has been made with the hope or expectation that some obligation will ensue. So, if the plaintiff here is claiming only for the conveyance of the abstract photoplay idea he must fail unless in conformity with the above stated rules he can establish a contract to pay.

From plaintiff's testimony . . . it does not appear that a contract to pay for conveyance of the abstract photoplay idea had been made, or that the basis for inferring such a contract from subsequent related acts of the defendants had been established, at the time plaintiff disclosed his basic idea to the secretary. Defendants, consequently, were at that time and from then on free to use the abstract idea if they saw fit to engage in the necessary research and develop it to the point of a usable script. Whether defendants did that, or whether they actually accepted and used plaintiff's synopsis, is another question. And whether by accepting plaintiff's synopsis and using it, if they did accept and use it, they may be found to have implicitly . . . agreed to pay for whatever value the synopsis possessed as a composition embodying, adapting and implementing the idea, is also a question which, upon the present summary judgment record, is pertinent for consideration, in reaching our ultimate conclusion. That is, if the evidence suggests that defendants accepted plaintiff's synopsis, did they not necessarily accept it upon the terms on which he had offered it? Certainly the mere fact that the idea had been disclosed under the circumstances shown here would not preclude the finding of an implied (inferred in fact) contract to pay for the synopsis, embodying, implementing and adapting the idea for photoplay production.
Pure Moral Obligation

A situation may create an obligation which transcends the law and ought to be so treated. This is the "life-saving case" in which a promise is made to reward a person who has incurred a crippling injury while saving the life of the promisor. In the leading case of Webb v. McGowin the court, to enforce the promise, relied on a moral obligation theory which has not been mentioned heretofore, but which is really quasi-contract with a dash of moral obligation thrown in—the theory that, if a service is rendered which the recipient would have asked for had he had the opportunity, it is to be presumed by a fiction of relation back or, more simply if one prefers, to be implied, that the services were rendered on request. If we stop here we have a quasi-contract theory. If we throw in something about moral obligation, we have the Webb case. The matter is put this way in the Webb case:60

Some authorities hold that, for a moral obligation to support a subsequent promise to pay, there must have existed a prior legal or equitable obligation, which for some reason had become unenforceable, but for which the promisor was still morally bound. This rule, however, is subject to qualification in those cases where the promisor having received a material benefit from the promisee, is morally bound to compensate him for the services rendered and in consideration of this obligation promises to pay. In such cases the subsequent promise to pay is an affirmation or ratification of the services rendered carrying with it the presumption that a previous request for the service was made.

A case of this kind has not appeared in California.

II. EXCEPTIONS WITH REGARD TO MODIFICATION AND DISCHARGE OF PROMISES

It is a fact of life that parties modify contracts as they see fit and without regard to the requirement of consideration. The only justification for adherence to that requirement is that it deters the "hold up" case.61 This is a danger which is undoubtedly more fancied than real and, as Professor Corbin suggests, it can be left to the courts to separate the sheep from the goats.62 On the other hand by giving

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60 27 Ala. App. 82, 168 So. 196 (1935).
61 Id. at 82, 168 So. at 198.
63 Corbin, Does a Pre-Existing Duty Defeat Consideration? 27 YALE L. J. 362, 373 (1917).
parties wide latitude to modify contracts the courts can be saved much sterile litigation. We find the law so oriented.

The same is true with regard to discharge of contracts. If parties are sensible enough to settle a hopeless situation on mutually agreeable terms it does the law no good to disturb their handiwork.

California statute has always given substantial power to modify, complete power to discharge, obligations without regard to consideration. The courts have substantially enlarged the power to modify by recognizing that an executory contract may be rescinded or extinguished by novation and a new contract then formed on terms which are less onerous as to one party. While these involve the consideration theory that the mutual release of executory rights is consideration for the rescission or novation, they are in fact indirect methods by which modification can be achieved without consideration and need to be discussed in this article. The courts have also conceived a method of discharge—called variously abandonment, abrogation, termination, cancellation and rescission—which, while it rests upon the same theory of consideration, is equally in derogation of the requirement of consideration. It too will be discussed.

It is in fact the superabundance of devices by which modification or discharge can be achieved in some measure of disregard of the principle of consideration that causes confusion in this area. Accord and satisfaction is another device which, while sounding in contract, involves exceptional treatment of the requirement of consideration and which therefore must be discussed to some extent.

A. Statutory Provisions Relating to Modification

Oral Contracts; Civil Code Section 1697

Civil Code section 1697 seems to be self-explanatory. It has not been the subject of interpretation and there is but a handful of cases in which it has been involved. It provides that an oral contract "... may be altered in any respect by consent of the parties, in writing,

\[53 \text{CAL. CIV. CODE } \S 1697: \text{"A contract not in writing may be altered in any respect by consent of the parties, in writing, without a new consideration, and is extinguished thereby to the extent of the new alteration."} \]

\[54 \text{CAL. CIV. CODE } \S 1524: \text{"Part performance of an obligation, either before or after a breach thereof, when expressly accepted by the creditor in writing, in satisfaction, or rendered in pursuance of an agreement in writing for that purpose, though without any new consideration, extinguishes the obligation."} \]

\[55 \text{Full text, supra note 49.} \]
without a new consideration, and is extinguished thereby to the extent of the new alteration." It implies that oral modification of an oral contract requires consideration. No case is found.

**Written Contracts; Civil Code Section 1698**

Civil Code section 1698 provides that a written contract "... may be altered by a contract in writing, or by an executed oral agreement, and not otherwise."

The requirement of a written "contract" to modify a contract in writing compels the conclusion that consideration is necessary for this method of modification. Again no case is found which actually deals with the point.

The alternative, executed oral agreement, is a method of modification which dispenses with the requirement of consideration. It permits such things as reduction of rent on a lease to the extent that the lesser amount is actually accepted by the landlord, modification of a property settlement agreement, and modification of a partnership agreement with respect to division of profits.

The oral agreement need not be to modify the contract, only to do something which is inconsistent with it, and it may be implied from a course of conduct which is inconsistent with the written agreement. Section 1698 does not apply where the contract contains a provision for modification, but a contract can be modified by executed oral agreement though it provides against alteration except by written agreement. And, despite the provisions of section 1698, a party may be estopped to deny an oral agreement to modify.

The power to modify was enlarged by *D. L. Godbey & Sons Constr. Co. v. Deane*, where it was held that while 1698 requires an "exe-

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56 Full text, *supra* note 49.
58 Julian v. Gold, 214 Cal. 74, 3 Pac. 2d 1009 (1931). Note that this method requires a lease to be treated as a divisible contract. Compare Macauley v. Jayben Corp., 17 Cal. App. 2d 37, 61 P.2d 354 (1938) (lesser amount must be tendered and accepted as in full payment of rent).
59 Stoltenberg v. Harveston, 1 Cal. 2d 264, 34 P.2d 472 (1934) (landlord may reinstate original rent requirements as to future rents).
cuted” oral agreement to modify, and while executed means performed on both sides, 1698 applies only when the modifying agreement is not supported by consideration; that if it is, it becomes binding when performed by one party. To Justice Schauer, dissenting, this was but “... one further step in the court-erosion of salutary code provisions ... by a process disguised as statutory construction.”

**Civil Code Section 1501 and Code of Civil Procedure Section 2706**

Though it goes beyond the scope of the article, attention must be called to Civil Code section 1501, and Code of Civil Procedure section 2706 if for no other reason than that they can embarrass the practitioner. They make failure to object to defects in tender waiver thereof, and the companion rule has been established that a particular objection waives others. The purpose of the rule is to give a party an opportunity to cure defects in a tender, and is based on principles of estoppel. It requires care to be exercised in the drafting of correspondence which goes into defects in a tender.

**B. Section 1698 Applies Only to “Alteration”**

It has been pointed out many times that Civil Code section 1698 applies only to “alteration” and has no application if the process is of another kind.

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67 Id. at 434, 434, 246 P.2d at 949, 949 (dissent).

68 CAL. CIV. CODE § 1501: “All objections to the mode of an offer of performance which the creditor has an opportunity to state at the time to the person making the offer, and which could be then obviated by him, are waived by the creditor, if not then stated.” CAL. CODE CIV. PROC. § 2076: “The person to whom a tender is made must, at the time, specify any objection he may have to the money, instrument, or property, or he must be deemed to have waived it; and if the objection be to the amount of money, the terms of the instrument, or the amount of kind of property, he must specify the amount, terms, or kind which he requires, or be precluded from objecting afterwards.”


Thus while the pre-existing duty rule applies in California it does not prevent rescission of a mutually executory bilateral contract and formation of a new contract which is more advantageous to one party, or novation with the same consequences.

*Western Lithograph Co. v. Vanomar Producers*\(^7^3\) applies the pre-existing duty rule, denying enforcement of an agreement to pay more for goods than called for by the contract. In contrast is *San Gabriel Valley Ready-Mixt v. Casillas.*\(^7^4\) There seller by written contract agreed to sell a quantity of cement at a certain price. Seller then asked a higher price which buyer declined to pay, saying he would get the cement elsewhere. Finding that he would have to pay higher prices elsewhere, buyer came back to seller. It was held that the original contract had been "abandoned" and a new one formed, in short that there was a novation and that buyer was required to pay seller his higher price. Also in contrast is *Jura v. Sunshine Biscuits.*\(^7^5\) Seller made a written contract to sell a quantity of figs for 200,000 dollars. Thereafter buyer advised that figs had become a glut on the market and that it could not afford to stand by the deal. Seller advised in return that it did not want to lose buyer's good will and that it would forego profit so as to be able to supply the figs at a lesser price. Buyer then took the figs and paid 120,000 dollars, its understanding of the lesser price. Seller sought and was denied recovery of the original price. It was found that the parties had rescinded the original contract and had formed a new one at a lower price.

### C. Integration of Successive Agreements—Real Estate Transactions

In real estate transactions escrow instructions may conflict with the contract so as to modify the obligation of one party in some way. Here it may be held that documents executed as part of a single transaction are to be taken together to determine the agreement of the parties with the later document superseding the earlier to the extent it is in conflict with it.\(^7^6\)

\(^{73}\) 185 Cal. 366, 197 Pac. 103 (1921).

\(^{74}\) 142 Cal. App. 2d 137, 298 P.2d 76 (1956).

\(^{75}\) 118 Cal. App. 2d 442, 258 P.2d 90 (1953).

D. Discharge, Novation, Accord and Satisfaction, and Written Acceptance of Part Performance

Statutes provide for discharge of contracts by novation\(^7\) and by two kinds of accord and satisfaction—accord and satisfaction as such,\(^7\) and written acceptance of part performance.\(^7\) Only the last is an exception to the consideration requirement but the other two involve exceptional treatment of that requirement and the three are so closely interrelated as to require discussion together.

Two of these have it in common that they do not extinguish the contract until they are executed: accord does not extinguish the original contract until there is satisfaction;\(^8\) and a written agreement to accept part performance of a contract does not discharge it until the performance is actually rendered.\(^8\) Novation on the other hand operates to extinguish the original contract immediately so that it is a defense to an action on that contract,\(^8\) which accord and satisfaction is not,\(^8\) and the original contract is not revived if the substituted contract is not performed.\(^8\)

\(^7\) CAL. CIV. CODE § 1530: “Novation is the substitution of a new obligation for an existing one.” CAL. CIV. CODE § 1531: “Novation is made: ... By substitution of a new obligation between the same parties, with intent to extinguish the old obligation.” CAL. CIV. CODE § 1532: “Novation is made by contract, and is subject to all the rules concerning contracts in general.”

\(^8\) CAL. CIV. CODE § 1521: “An accord is an agreement to accept, in extinction of an obligation, something different from or less than that to which the person agreeing to accept is entitled.” CAL. CIV. CODE § 1522: “Though the parties to an accord are bound to execute it, yet it does not extinguish the obligation until it is fully executed.” CAL. CIV. CODE § 1523: “Acceptance by the creditor, of the consideration of an accord, extinguishes the obligation, and is called satisfaction.”

\(^7\) CAL. CIV. CODE § 1524, text quoted note 50 supra.


\(^8\) CAL. CIV. CODE § 1524, text quoted at note 50 supra.

\(^8\) Alexander v. Angel, 37 Cal. 2d 856, 236 P.2d 561 (1951); Beckwith v. Sheldon, 165 Cal. 319, 131 Pac. 1049 (1913); Richardson v. Hislop, 109 Cal. App. 440, 293 Pac. 168 (1930). But there must be intent to extinguish the old obligation. CAL. CIV. CODE § 1530, text quoted at note 72 supra. And there is particular reluctance to find this where one debt is undertaken to be substituted for another. See cases collected in 1 Witkin, Summary of California Law Contracts § 315 (7th ed. 1960). See also Bowden v. Bank of America, N.T. & S.A., 36 Cal. 2d 406, 224 P.2d 713 (1950).

\(^8\) See cases cited note 75 supra.

\(^8\) See cases cited note 77 supra. See also Producers Fruit Co. v. Goddard, 75 Cal. App. 737, 243 Pac. 686 (1925) (original contract discharged though new contract un-
Part performance must be accepted in writing. Accord and satisfaction can be oral or evidenced by conduct. This permits part payment, without more, to work an accord and satisfaction, and the "check-cashing rule" in all of its ramifications has been the important body of case law under the accord and satisfaction statute. Accord and satisfaction is a contract concept, however, so that part payment of an undisputed obligation will not operate as an accord and satisfaction. Written acceptance of part payment will, on the other hand, discharge an undisputed obligation. Novation is also a contract concept, but, as has been seen, the mutual surrender of executory rights provides consideration for discharge of the original contract.

**Written Release: Civil Code Section 1541**

A written release discharges an obligation though no consideration is given for the release. indicated that Civil Code section 1541 requires an express release but two later cases have departed from such a requirement. In it was held that a receipt was sufficient to constitute a release; a dissent protested this departure from the requirement of an express release. And in it was held that a "waiver" of interest constituted a release.

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enforceable—is this the intent of the parties?) Compare Pearsall v. Henry, 153 Cal. 314, 95 Pac. 154 (1908); Young v. Benton, 21 Cal. App. 382 131 Pac. 1051 (1913). See Comment, 14 CALIF. L. REV. 408 (1926).

85 CAL. CIV. CODE § 1524, text quoted at note 50 supra.


87 Ibid., and cases cited therein.

88 Berger v. Lane, 190 Cal. 443, 212 Pac. 45 (1923); Lapp-Gifford Co., v. Muscoy Water Co., 168 Cal. 25, 134 Pac. 989 (1913). "But 'it matters not that there was no solid foundation for the dispute' as the test is whether 'the dispute was honest or fraudulent.'" Potter v. Pacific Coast Lumber Co., supra note 81, at 597, 234 P.2d. at 18.


90 CAL. CIV. CODE § 1532, text quoted at note 72 supra.


93 Supra note 87.

94 Text quoted note 50 supra.


96 Supra note 87.
E. Discharge by Abandonment, Etc.

The case law establishes that parties may terminate a mutually executory contract by processes variously described as abandonment, abrogation, termination, cancellation, and rescission, all of which in this context have the same meaning. The mutual release of executory rights is made consideration for discharge of the contract.

III. CONCLUSION

It is clear that the California courts will not apply the doctrine of consideration in doctrinaire fashion and will afford parties substantial leeway to settle practical problems in a practical way. It remains for the legislature to make the changes of a drastic nature which are left to be made, such as “firm offer” statutes.

97 See cases cited note 67 supra.