C & K Engineering Contractors v. Amber Steel Co.: Promissory Estoppel and the Right to Trial by Jury in California

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In *C & K Engineering Contractors v. Amber Steel Co.*¹ the California Supreme Court held that there is no right to a jury trial in an action based upon the doctrine of promissory estoppel,² even when the plaintiff seeks only money damages. The action came about when a subcontractor revoked a bid that had been relied upon by a general contractor. C & K Engineering, the general contractor, solicited bids from Amber Steel and other subcontractors for the installation of reinforcing steel in a wastewater treatment plant. C & K included Amber's bid in its master bid, which ultimately was accepted by the public sanitation district, the proposed owner of the plant. After Amber refused to perform in accordance with its bid on the subcontract, C & K brought an action based on the theory of promissory estoppel to recover money damages for Amber's alleged breach of contract.

C & K alleged that it reasonably relied on Amber's bid in submitting its master bid and, when Amber refused to perform in accordance with its bid, C & K was required to expend additional money to perform the reinforcing steel work. Amber maintained that its bid was the result of an honest mistake in calculation and that C & K knew of the mistake but failed to notify Amber or permit it to revise its bid as was customary in the industry. Amber demanded a jury trial but the trial court, deeming the case to be essentially in equity, denied the request. The trial court, however, did empanel an advisory jury to consider the

¹ 23 Cal. 3d 1, 587 P.2d 1136, 151 Cal. Rptr. 323 (1978).
² The doctrine of promissory estoppel has been defined by the Restatement of Contracts § 90 (1932) as follows: "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." This Note uses the terms "promissory estoppel" and "section 90" interchangeably. The California courts have adopted the Restatement definition as a rule of law. Drennan v. Star Paving Co., 51 Cal. 2d 409, 413, 333 P.2d 757, 759 (1958); Saliba-Kringlen Corp. v. Allen Eng'r Co., 15 Cal. App. 3d 95, 100, 92 Cal. Rptr. 799, 800-01 (1971); H.W. Stanfield Constr. Corp. v. Robert McMullan & Son, Inc., 14 Cal. App. 3d 848, 852, 92 Cal. Rptr. 669, 671 (1971); Associated Creditors' Agency v. Haley Land Co., 239 Cal. App. 2d 610, 616, 49 Cal. Rptr. 1, 5 (1966).
issue of reasonable reliance. The advisory jury found that C & K reasonably relied to its detriment on Amber's bid. The trial court adopted this finding and awarded C & K the usual contract measure of damages—the difference between what C & K was required to pay for the work and what it would have paid had Amber fully performed on its bid. 3

Amber appealed, contending that it was improperly denied a jury trial under the California Constitution. Although the constitution declares that “[t]rial by jury is an inviolate right and shall be secured to all,” 4 this provision has been interpreted by the California Supreme Court to guarantee the right to trial by jury where the “gist of the action” is legal, but not where the “gist” is equitable. 5 The gist of the action is legal if the same or a similar action existed at common law in 1850, when the California Constitution was adopted, or if it deals with legal rights. 6 The court in C & K applied this test in affirming the trial court opinion, 7 characterizing the “gist of the action” in a promissory estoppel case as equitable rather than legal. 8 The dissent argued that in determining the right to trial by jury California courts should focus not on the gist of the action or the nature of the rights involved, but rather on the remedies requested, and therefore a plaintiff who seeks damages should be entitled to a jury trial. 9

The majority briefly reviewed both the history and the current application of promissory estoppel and characterized it as “‘a doctrine which employs equitable principles to satisfy the requirement that consideration must be given in exchange for the promise sought to be enforced.’” 10 In the opinion of the court damages for breach of a promise not supported by consideration were available in equity but not in law prior to 1850. Hence, historically the gist of a promissory estoppel action had to be equitable. The court emphasized that the principle of “avoidance of injustice,” which it labeled an equitable principle, is what renders a gratuitous promise enforceable under

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3. 23 Cal. 3d at 5-6, 587 P.2d at 1137-38, 151 Cal. Rptr. at 324-25.
4. CAL. CONST. art. 1, § 16.
6. Id. at 299-300, 231 P.2d at 843-44. The constitution also has been interpreted by statute: “In actions . . . for money claimed as due upon a contract . . . an issue of fact must be tried by a jury . . . .” CAL. CIV. PROC. CODE § 592 (West 1976). This statutory preference for jury trial in contract actions should have a strong bearing on the interpretation of promissory estoppel as a contractual or equitable action.
7. 23 Cal. 3d at 9, 587 P.2d at 1140, 151 Cal. Rptr. at 327.
8. Id. at 11, 587 P.2d at 1141, 151 Cal. Rptr. at 328.
10. Id. at 6, 587 P.2d at 1138, 151 Cal. Rptr. at 325 (quoting Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665, 672, 517 P.2d 1157, 1161, 111 Cal. Rptr. 693, 697 (1974)) (emphasis by the court).
promissory estoppel. The court also found that discretion is fundamental to promissory estoppel actions, apparently in regard both to imposition of liability and assessment of damages. The use of discretion to avoid injustice under the doctrine of promissory estoppel led the court to conclude that the doctrine is equitable, not legal.\textsuperscript{11}

After reaching this conclusion, the court accordingly held that there is no right to trial by jury in promissory estoppel actions. The court did note that the mode of relief ordinarily determines the legal or equitable nature of a cause of action and that equitable principles are guides to courts of law as well as courts of equity. Nonetheless, the court held that when the cause of action and the granting of relief depend upon the application of equitable doctrines there is no right to jury trial no matter what form of relief is sought.\textsuperscript{12}

This Note will demonstrate that there should be a right to jury trial in promissory estoppel actions where damages are sought, both because promissory estoppel should be considered a form of contract action and because jury trial should be a matter of right whenever a plaintiff seeks damages. In support of this contention, promissory estoppel and the right to trial by jury each are analyzed comprehensively. First, the court's determination that a promissory estoppel action is equitable rather than legal is criticized. This criticism is premised on the notions, developed in detail in the Note, that a promissory estoppel action is legal because there was enforcement of gratuitous promises at common law and, more significantly, that the analogy between promissory estoppel and contract actions is so strong as to require the former to be considered a species of the latter. All of the major features of an action in contract—definitions, rights and duties, consideration, and damages—are examined and analogized to their counterparts in promissory estoppel. This analysis will demonstrate that the stages of a promissory estoppel action are analyzed by courts and commentators in contract terms and the nature of the rights that are created and enforced in contract are essentially the same as those in promissory estoppel.

The Note then turns to the "gist of the action" test, particularly as used by the majority in \textit{C \& K}. The discussion focuses on the limitations of the test in distinguishing legal from equitable claims—failure to accurately reflect the historical distinction between law and equity, difficult application in a modern context, and the potential for circumscribing the constitutional right to trial by jury. Because of these problems with the gist of the action test, this Note, in accordance with the dissent in \textit{C \& K}, indicates that the remedy sought almost always should determine the right to trial by jury. A claim for damages in a

\begin{itemize}
\item\textsuperscript{11} 23 Cal. 3d at 7-8, 587 P.2d at 1138-39, 151 Cal. Rptr. at 325-26.
\item\textsuperscript{12} Id. at 9, 587 P.2d at 1140, 151 Cal. Rptr. at 327.
\end{itemize}
promissory estoppel case therefore should guarantee the right to trial by jury.

Promissory Estoppel

Historical Bases of the Doctrine

An examination of the origins of contract law reveals that the principles upon which promissory estoppel is based closely resemble those that supported contract actions at early common law. The consensus among authorities is that the initial basis for the enforcement of simple contracts in the action of assumpsit was action or forbearance in justifiable reliance on a promise—rather than the more modern notion of purchase of a promise for a price. The court in C & K acknowledges this genesis of contract law but argues that by 1850 assumpsit would not lie to enforce a gratuitous promise. Although during the nineteenth century the bargain concept was the dominant source of contractual liability, contrary to the court's finding, liability based upon detrimental reliance remained a credited, if little used, doctrine of contract law. Corbin writes that there have always been informal contracts with no assent or consideration and that history was never inconsistent with section 90 of the Restatement of Contracts.


14. 23 Cal. 3d at 7, 587 P.2d at 1139, 151 Cal. Rptr. at 326. A gratuitous promise is a "promise which is not in fact founded upon a bargained-for equivalent or 'a price requested and received by the promisor for the promise.'" Shattuck, Gratuitous Promises—A New Writ?, 35 Mich. L. Rev. 908, 909 n.4 (1937) [hereinafter cited as Shattuck].

15. "Faith in free enterprise reached its zenith in nineteenth-century America, which placed its trust in the dignity and creativity of the individual and in the social utility of the wealth that he produced . . . . The goal was a society in which decision making was widely dispersed among its members . . . . The mechanism devised to achieve this goal centers about transactions called 'exchanges,' in which each party gives something in return for what is given by the other party. Under the market principle, equivalence in these exchanges is determined by the forces of supply and demand arising out of the productivity and the value judgments of individuals. Their terms are arrived at voluntarily by the parties themselves through the process referred to as 'bargain' by Adam Smith," Farnsworth, The Past of Promise: An Historical Introduction to Contract, 69 Colum. L. Rev. 576, 577 (1969) [hereinafter cited as Farnsworth].

16. 1A A. Corbin, Corbin on Contracts § 194, at 192-97 (rev. ed. 1963) [hereinafter cited as Corbin]. In documenting its assertion that as of 1850 gratuitous promises were not enforced at law the court takes several sources out of context. For example, Ames says that
There were several specific fact patterns in which gratuitous promises were enforced at early common law. Moreover, there is no indication that actions based on these fact patterns were confined to equity or that they had disappeared by 1850. The most historically significant of these patterns involves the promise to perform a gratuitous undertaking, which has been described by Professor Boyer as the precedent for promissory estoppel. Cases of gratuitous undertakings have been cited as among the earliest sources for the action of assumpsit; the action consisted of the defendant undertaking to do something and injuring the plaintiff by inducing reliance on the undertaking. This early doctrine received renewed impetus in the famous case of Coggs v. Bernard, in which Chief Justice Holt stated that the promisee's trust in the promisor's undertaking can be sufficient consideration to support a promise. Subsequent cases both in England and the United States relied on this opinion as a basis for upholding contracts in similar situations.

Other instances in which gratuitous promises were enforced prior to 1850 include promises under seal, promises to make charitable subscriptions, and promises made out of moral obligation. Both the

from 1531 “a detriment has always been deemed a valid consideration for a promise if incurred at the promisor’s request.” Ames, The History of Assumpsit, 2 HARV. L. REV. 1, 14 (1888) (Part I). This statement simply describes one circumstance in which a promise was enforced; the court jumps from it to an assertion that “as of 1850 assumpsit would not lie to enforce a gratuitous promise, where the promisee’s detrimental reliance was not requested by the promisor.” 23 Cal. 3d at 7, 587 P.2d at 326, 151 Cal. Rptr. at 326. Shattuck states: “Anglo-American law starts from the premise that a promise creates no legal rights nor duties when it is not supported by a bargained-for consideration. There is, however, a large group of cases apparently not conforming to this rule.” Shattuck, supra note 14, at 914. The court in C & K ignores the latter sentence.

18. 1 WILLISTON, supra note 13, § 138, at 597.
19. Id. See Beale, Gratuitous Undertakings, 5 HARV. L. REV. 222 (1892).
21. Id. at 113. Commenting on this case, Boyer explains: “Here all of the elements of the doctrine [of promissory estoppel] are present. There is a promise reasonably expected to and which does induce an injurious reliance to the detriment of the promisee. Unless the promise is enforced, the promisee will suffer undue hardship.” Boyer, supra note 17, at 669.
22. See Shattuck, supra note 14, at 916 n.25.
23. 1A CORBIN, supra note 16, § 252.
24. This class of cases is separable from the others because of its recent creation. In 1937 Shattuck wrote that these charitable subscription cases had been litigated only during the past 125 years, but in the United States the promises are enforced to the letter as contracts. Shattuck, supra note 14, at 931. Because enforcement was rooted in public policy considerations, id. at 932, these cases foreshadow promissory estoppel. See Boyer, supra note 17, at 644-53. “Promissory estoppel probably received its first open recognition in connection with the enforcement of charitable subscriptions.” Id. at 652.
25. Moral obligation has had a variety of meanings in legal history. A moral obliga-
recognition of these fact patterns and the influence of the Coggs opinion suggest that enforcement of gratuitous promises was well established during the nineteenth century despite the prominence of the bargain theory. Enforcement of these promises represented the foundation for promissory estoppel; hence, at the time of the adoption of the constitution in 1850 no new theories were required to enforce a gratuitous promise in many situations. Consequently, the drafters of section 90 of the Restatement did not create a new right, but instead expanded the coverage of existing theory by extracting the connecting principle from a variety of situations and placing more emphasis on the injustice itself than the specific circumstance in which it arose. The historical status of promissory estoppel, although perhaps less than conclusive as to the status of the doctrine, lends support to the proposition that promissory estoppel should be regarded as a contract action.

The Analogy Between Promissory Estoppel and Contract

Definitions

In addition to the historical connection between promissory estoppel and contract, judicial treatment of the two actions, as well as commentators’ opinions, indicate their similarity. The leading authorities unreservedly classify as contract a promise enforced because of justifiable detrimental reliance.26 At least one California Court of Appeal has assumed that a contract results when the requirements of section 90 are met.27 Further, California has judicially adopted section 90 of the Restatement generally refers to an implied in law obligation, although it is too often given the misnomer of "past consideration." See note 64 infra. Under Lord Mansfield, in the late eighteenth and early nineteenth centuries, the concept magnified into a doctrine which could support a promise by an appeal to moral and natural law. The Mansfield era brought English contract law closer than it has ever been to the civil law and consideration was nearly reduced to little more than one item of evidence which could prove the existence of a contract. This Mansfield doctrine enjoyed an intense, although short-lived, popularity. Yet vestiges of it survived to support promises in two situations: when there was an unenforceable precedent debt; and when an act had been done at the defendant's request. See 1 WILLISTON, supra note 13, §§ 142-149; Holdsworth, The Modern History of the Doctrine of Consideration, 2 B.U.L. REV. 87, 174, 186-95 (1922) (Parts 1 and 2).

26. See 1 WILLISTON, supra note 13, § 140, at 610-11; Henderson, supra note 13, at 380. Corbin includes § 90 under the topic heading of Informal Contracts Without Mutual Assent or Consideration. 1A CORBIN, supra note 16, Topic C, at 187. These three writers, the chief victims of the C & K court's cursory summation of authority, are all cited by the court in support of its categorization of promissory estoppel as an equitable doctrine, rather than a contract. 23 Cal. 3d at 7, 587 P.2d at 1138-39, 151 Cal. Rptr. at 325-26.

statement of Contracts,28 both editions of which maintain that the section operates to create a contract.29 Any court certainly is free to reject the conclusions of the commentators and the Restatement, but the intimate historical and practical connection between the bases of liability in contract and promissory estoppel nonetheless remains. The essence of the common law definition of a contract is a promise the law will enforce;30 promissory estoppel is within this definition because it also is based upon a promise the law will enforce in certain circumstances.

From a definitional viewpoint, the C & K court finds its lone support in the California Civil Code, in which a contract is defined as “an agreement to do or not do a certain thing.”31 Promissory estoppel does not conform to this definition as it does not involve an agreement. The code definition is incomplete, however, because it is more restrictive than the common law definition and because in practice the courts recognize that not all contracts are agreements.32 Liability is imposed by California courts not because there has been an agreement, but because promises are made and broken33—the very basis of liability in promissory estoppel. The element of section 90 upon which the California courts have been most insistent is the existence of an unambiguous promise;34 this requirement has been used effectively to prevent abuse of the doctrine. Hence, from a practical and historical viewpoint there

29. The first Restatement included § 90 within a heading entitled Informal Contracts Without Assent or Consideration. The second Restatement is more explicit: “A promise binding under this section is a contract . . . .” RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment d at 217 (Tent. Drafts Nos. 1-7, 1973).
30. Farnsworth, supra note 15, at 578 (quoting F. Pollock, PRINCIPLES OF CONTRACT 1 (12th ed. 1946)). See also 1A CORBIN, supra note 16, § 193, at 187. Professor Williston’s elaborate definition is probably the most influential in America: “A contract is a promise, or set of promises, for breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.” 1 WILLISTON, supra note 13, § 1, at 1. The RESTATEMENT OF CONTRACTS § 1 (1932) adopted this definition.
32. CALAMARI & PERILLO, CONTRACTS §§ 1-1, at 2 (2d ed. 1977) [hereinafter cited as CALAMARI & PERILLO]. See also 1A CORBIN, supra note 16, § 3, at 5-6. A promise enforced because of “past” consideration is the most notable instance of a contract without agreement. See note 64 infra. Unilateral contracts do not require an agreement and are enforced in California. For a discussion of unilateral contracts see Davis v. Jacoby, 1 Cal. 2d 370, 378, 34 P.2d 1026, 1029 (1934) (finding contract bilateral).
is nothing in the current definition of an action in contract to exclude the doctrine of promissory estoppel.

Rights and Duties

As the examination of contract and promissory estoppel goes from definitions to the nature of the attendant rights and duties, the immediacy of the analogy becomes more convincing. Central to both contract and promissory estoppel is the right to receive a promised performance; enforcement of rights in both actions is predicated on reliance on the promise, either because of action or forbearance, or the promise of action or forbearance, on the part of the promisee. Debate focuses not so much on whether the rights are similar but on whether they are similar or identical.

undertaking, however expressed, either that something shall happen, or that something shall not happen, in the future." Restatement of Contracts § 2 (1932).

35. This is in contrast to the right to be secure, which is the basis of tort liability. Shattuck, supra note 14, at 910 n.9. See also W. Prosser, Handbook of the Law of Torts § 92, at 613 (4th ed. 1971): "Tort actions are created to protect the interest in freedom from various kinds of harm . . . . Contract actions are created to protect the interest in having promises performed."

36. Fuller and Perdue identify three interests that contract law seeks to protect. The reliance interest protects the promisee from potential harm caused by his or her change of position. The restitution interest returns to the promisee the value which has unjustly enriched the promisor. The expectation interest gives the promisee the full value of what was promised, in large part because he or she has forgone other opportunities. The reliance interest is the crucial one; the other two interests embody and are particular manifestations of the reliance interest. See Fuller & Perdue 1, supra note 13, at 53-75.

37. Shattuck is representative of those authorities who do not believe that promissory estoppel necessarily creates a contract right, but his position is reconcilable with the analysis presented in this Note. He states that promissory estoppel is somewhat of a hybrid between tort and contract, "although more closely resembling the latter." Shattuck, supra note 14, at 942. Thus the right is essentially legal rather than equitable, even if not purely contractual. Shattuck would not find a contract label objectionable except that this classification would result in an expectation rather than reimbursement measure of damages. Id. at 942. Even as to the distinction he wishes to draw based on damages, Shattuck concedes that the extent of the promisor's responsibility "rests in contemporary concepts of morality and justice." Id. at 943. More than forty years after Shattuck's article, contemporary morality generally favors a contract measure of damages and courts have proved willing to administer reliance damages where appropriate despite their conviction that promissory estoppel creates a contract. See note 114 & accompanying text supra. For a perspective resembling that of Shattuck see Seavy, Reliance Upon Gratuitous Promises or Other Conduct, 64 Harv. L. Rev. 913 (1951).

38. "The detrimental reliance serves as a substitute for consideration, giving rise to a contract right in the plaintiff." Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 649, 394 P.2d 571, 578, 39 Cal. Rptr. 731, 738 (1964). Williston was so committed to the identity of contractual and promissory estoppel rights that he favored full enforcement of the promise in every case of promissory estoppel. See Fuller & Perdue 1, supra note 13, at 64 n.14. Whether or not this unbending approach to damages is correct, see note 112 & accompanying text infra, the link remains between the right to damages in these actions.
The court in *C & K* nonetheless distinguishes the rights on the grounds that in promissory estoppel the right is created by a gratuitous promise.\(^{39}\) According to the court's position, it is therefore a weaker right which should be enforced only at the discretion of an equity court. Others have argued to the contrary, however, pointing out that the promisee who has justifiably relied to his or her detriment on a promise (as in promissory estoppel) may have a more legitimate right to receive the promised performance than does the promisee who is merely awaiting an expectancy (as in an executory bilateral contract).\(^{40}\) In addition, as noted previously, the right in the former instance was the first to be recognized at common law; executory bilateral contracts were not enforced until the sixteenth century.\(^{41}\) Corbin contends that the contract right derives from the reasonable expectations of the promisee,\(^{42}\) a conclusion supported by the “expectation” measure of contract damages. Under this approach, the gratuitous or bargained-for character of the promise would be unimportant provided the expectation was reasonable, as it must be in promissory estoppel.

There is somewhat less similarity between the duties of the promissory estoppel and contractual promisors than is the case with the rights of the promisees in these actions. The duties can be distinguished on two grounds: the duty of the promissory estoppel promisor is not voluntarily assumed through a process of mutual assent, but is imposed by law, and this duty is “one-way” because the promisee has no return obligation. These distinctions, however, are largely semantic. Although not arrived at through mutual assent the promissory estoppel promisor’s duty is consensual in the sense that it is directly and voluntarily assumed as to a particular promisee.\(^{43}\) It is direct because it is not owed to the world at large or to a class of foreseeable plaintiffs.\(^{44}\) It is voluntary because the duty is imposed only when the promisor has con-

\(^{39}\) 23 Cal. 3d at 6-8, 587 P.2d at 1139, 151 Cal. Rptr. at 325-26.

\(^{40}\) "In passing from compensation for change of position to compensation for loss of expectancy we pass, to use Aristotle’s terms again, from the realm of corrective justice to that of distributive justice. The law no longer seeks merely to heal a disturbed status quo, but to bring into being a new situation. It ceases to act defensively or restoratively, and assumes a more active role. With the transition, the justification for legal relief loses its self-evident quality.” Fuller & Perdue I, *supra* note 13, at 56-57.


\(^{42}\) The attempt to realize the reasonable expectations that have been induced by the making of a promise is the axiomatic contract principle, and “an understanding of many of the existing rules and a determination of their effectiveness require a lively consciousness of this underlying purpose.” 1 *Corbin, supra* note 16, § 1, at 2.

\(^{43}\) Shattuck, *supra* note 14, at 941.

sciously chosen to promise with actual knowledge of the consequences or in circumstances in which the consequences should have been recognized.

This direct and voluntary relationship between the parties is distinctly contractual in that it centers around the private autonomy of the parties—they have power to effect changes in their legal relations without governmental intervention. Notwithstanding the contractual nature of the relationship, it would be illogical to afford the promisor the usual defense that he or she has no potential gain, since the promisor has promised explicitly to carry out an undertaking regardless of any gain and should have foreseen that this promise would be relied upon to the injury of the promisee in the event of its breach. The contention that the obligation is noncontractual because its measure is imposed by law also is devoid of merit. The obligation that the law "imposes" is never greater than the obligation assumed but not carried out.

Case law minimizes the second purported dichotomy between the duties of the promisor in promissory estoppel and contract. The duty in promissory estoppel is considered "one-way" because of the lack of mutuality of obligation. There are many exceptions to this mutuality requirement in contract law, however, such as contracts voidable at the option of one party, unilateral contracts, and option contracts. Thus, lack of mutuality of obligation need not preclude an action from sounding in contract. In all of these exceptions, however, some exchange is contemplated and this is not a requirement in promissory estoppel. The analogy is nonetheless significant because in practice, in most promissory estoppel situations, the promise is made because the promisor expects some potential advantage.

The extent to which promissory estoppel is a departure from contract principles which value the private autonomy of the parties should not be overlooked. The parties have not worked out an exchange mutually, so the precise terms imposed by the court to some extent supersede the intentions of the parties. Although in other contexts the courts

45. The concept of private autonomy is sometimes referred to as the will theory of contract. The desiderata are freedom of the individual and political decentralization. See Fuller, Consideration and Form, 41 COLUM. L. REV. 799, 806-10 (1941) [hereinafter cited as Fuller].


49. See note 89 & accompanying text infra.
have professed a willingness to infer terms without abandoning con-
tract law, promissory estoppel is a more radical departure from pri-
vate autonomy because the court infers not only the essential terms but
the very existence of the contract. Although the obligation in promis-
sory estoppel involves exceptions to certain traditional concepts, it nev-
ertheless is essentially consistent with the obligation to fulfill promises
that contract law imposes. The following discussion of consideration
will show that the duty in promissory estoppel actions also is consistent
with contemporary developments in contractual responsibility.

Consideration

The usual explanation as to why contract status is denied to
promises enforced because of promissory estoppel is that such promises
are deemed to be unsupported by consideration in the sense of bar-
gained-for exchange. In this view, only promises that have been paid
for merit full contract status. This contention, however, is not corrobo-
rated by either past or present contract law as numerous exceptions to
the requirement of consideration have always existed.

Currently, the most widely accepted common law definition is a
benefit to the promisor or a detriment to the promisee, a definition
that can encompass an action in promissory estoppel. The considera-
tion doctrine developed as a means of amalgamating a variety of fact
patterns in which promises were enforced, including promises en-

50. E.g., California Lettuce Growers, Inc. v. Union Sugar Co., 45 Cal. 2d 474, 481, 289
P.2d 787, 790 (1955) (the law “leans against the destruction of contracts because of uncer-
tainty; and it will, if feasible, so construe agreements as to carry into effect the reasonable
intentions of the parties if that can be ascertained”). See also Forde v. Vernbro Corp., 218

51. “The doctrine is framed with reference to contractual obligation . . . it seems but
logical to apply it in accordance with the principles generally applicable to any contract
problem.” Boyer, Promissory Estoppel: Requirements and Limitations of the Doctrine, 98 U.
Pa. L. Rev. 459, 467 (1950) [hereinafter cited as Promissory Estoppel].

52. See C & K Eng'r Contractors v. Amber Steel Co., 23 Cal. 3d 1, 6, 587 P.2d 1136,

53. Anchor Cas. Co. v. Surety Bond Sav. & Loan Ass'n, 204 Cal. App. 2d 175, 181, 22
Cal. Rptr. 278, 281 (1963); Blonder v. Gentile, 149 Cal. App. 2d 869, 875, 309 P.2d 147, 151
(1957); Southern Cal. Enterprises v. Walter & Co., 78 Cal. App. 2d 750, 760, 178 P.2d 785,
791 (1947); 1A CORBIN, supra note 16, § 195, at 197; 1 WILLISTON, supra note 13, § 99, at
369.

The general acceptance of this definition belies a history which has been described as
“tortuous, confused and wrapped in controversy.” CALAMARI & PERILLO, supra note 32,
§ 4-1, at 133. Moreover, Corbin has defined consideration as any factor held to make a
promise binding. 1 CORBIN, supra note 16, § 110, at 492. Farnsworth regards consideration
as nothing more than a word of art used to describe the sum of the necessary conditions for
an action to lie in assumpsit. Farnsworth, supra note 15, at 598.

54. Two quite different classes of cases led to the alternative definitions of considera-
tion as a benefit to the promisor or detriment to the promisee. Generally, in the first class of
forced because of events occurring prior to, contemporaneous with, or subsequent to the making of the promise. Only the second category qualifies as an exchange, although it does represent the majority of cases. Not until the late nineteenth century can any doctrinal rule be found that the promise and the detriment must be mutual inducements. The Restatement of Contracts adopted this narrow definition of consideration as something bargained for and given in exchange for a promise, but then devoted ten sections to describe what other factors will make a promise enforceable.

As this history demonstrates, consideration has not been synonymous with bargain, but potentially and actually has been more inclusive. Despite this history the statutory rule defining consideration in California is that the detriment must induce the promise. As has happened throughout history, however, there has been a need in California either to find alternative justifications for enforcement of promises or to

cases, the precedent debt which originally arose in consequence of some benefit received by the defendant made the defendant's promise enforceable. In the second and older class of cases, the action stemmed from an injury to the plaintiff caused by entrusting his or her person or property to the defendant in reliance on the latter's promise or undertaking. See 1 Williston, supra note 13, § 99, at 367-69. See generally Ames, The History of Assumpsit, 2 Harv. L. Rev. 1 (1888) (Part I); Ames, The History of Assumpsit, 2 Harv. L. Rev. 53 (1888) (Part II); Parnsworth, supra note 15; Holdsworth, Debt, Assumpsit and Consideration, 11 Mich. L. Rev. 347 (1913).

55. 1 Corbin, supra note 16, § 110, at 494.

56. Certain famous pronouncements by Holmes led to the presumption that there is no binding promise without a bargain: "The root of the whole matter is the relation of reciprocal conventional inducement, each for the other, between consideration and promise." O. Holmes, The Common Law 293-94 (1881). Later this idea was phrased as: "It is not enough that the promise induces the detriment or that the detriment induces the promise if the other half is wanting." Wisconsin & Mich. Ry. v. Powers, 191 U.S. 379, 386 (1903). This opinion did not fully represent the development of the law, as Holmes had admitted earlier: "There must be some ground for saying that the acts done in reliance upon the promise were contemplated by the form of the transaction either impliedly or in terms as the conventional inducement, motive and equivalent for the promise. But courts have gone very great lengths in discovering the implication of such an equivalence, sometimes perhaps even having found it in matters which would seem to be no more than conditions or natural consequences of the promise." Martin v. Meles, 179 Mass. 114, 117, 60 N.E. 397, 398 (1901).

57. Restatement of Contracts § 75 (1932). The second Restatement is almost apologetic about this definition. It remarks that consideration often is given different meanings. "It is often used merely to express the legal conclusion that a promise is enforceable. . . [or] to refer to almost any reason asserted for enforcing a promise." Restatement (Second) of Contracts § 75, Comment a at 149-50 (Tent. Drafts Nos. 1-7, 1973).


59. "[A]ny benefit conferred, or agreed to be conferred, upon the promisor, by any other person, to which the promisor is not lawfully entitled, or any prejudice suffered, or agreed to be suffered, by such person, other than such as he is at the time of consent lawfully bound to suffer, as an inducement to the promisor, is a good consideration for a promise." Cal. Civ. Code § 1605 (West 1954).
stretch the definition of consideration. If executed in a writing no consideration is needed in California for a release, for a waiver of the statute of limitations, or for modification of an oral contract. A moral obligation also may support a promise, at least where there was previously a benefit to the promisor or a detriment to the promisee. Moreover, California courts have held that justifiable detrimental reliance is consideration, or a "substitute" for consideration.

In light of these numerous exceptions, the requirement of consid-

60. Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665, 672, 517 P.2d 1157, 1161, 111 Cal. Rptr. 693, 697 (1974) (substitute for consideration); Tomerlin v. Canadian Indem. Co., 61 Cal. 2d 638, 649, 394 P.2d 571, 578, 39 Cal. Rptr. 731, 738 (1964) (detrimental reliance serves as a substitute for consideration); Wade v. Markwell & Co., 118 Cal. App. 2d 410, 419, 258 P.2d 497, 502 (1953) (promissory estoppel recognized as a species of consideration or a substitute for consideration). In Raedeke, the court conceded that there is some basis for holding that promissory estoppel is an action at law. 10 Cal. 3d at 674 n.4, 517 P.2d at 1162, 111 Cal. Rptr. at 698.

61. CAL. CIV. CODE § 1541 (West 1954).
63. CAL. CIV. CODE § 1697 (West Supp. 1978). See U.C.C. § 2-209(1) ("[a]n agreement modifying a contract within this Article needs no consideration to be binding").
64. "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise." CAL. CIV. CODE § 1606 (West 1954). See, e.g., Davison v. Anderson, 125 Cal. App. 2d Supp. 908, 910, 271 P.2d 233, 235 (1954). See also Medberry v. Olcovich, 15 Cal. App. 2d 263, 59 P.2d 551 (1936). In Medberry the court decided that a promise made to the father of an injured minor that the promisor would take care of reasonable medical expenses resulting from the accident caused by his own child was based on a moral obligation on the part of the promisor and was supported by a good consideration where the father of the injured child relied on such promise and incurred expenses on the strength of it. This case is interesting because it contains elements both of moral obligation and promissory estoppel enforcement based on events which occurred before and after, but not simultaneously with, the making of the promise. Moral obligation is sometimes given the self-contradictory label of "past consideration" and almost always is used in that sense. The "past consideration" which supports moral obligations in California is really not consideration at all. There was once detriment to the promisee, but the promise was not made to obtain that detriment. See 1A CORBIN, supra note 16, § 210, at 273-75; 1 WILLISTON, supra note 13, § 142, at 620-24.
65. See note 60 supra. A final exception to the consideration requirement, no longer specifically applied by California courts, is the statutory provision stating that consideration or "cause" is sufficient to support a promise. CAL. CIV. CODE § 1550 (West 1954). Cause was the basis for enforcement of promises under Roman law and survives in variegated forms in civil law countries. See 1 CORBIN, supra note 16, § 111, at 495; von Mehren, Civil-Law Analogues to Consideration: An Exercise in Comparative Analysis, 72 HARV. L. REV. 1009 (1959). Any kind of justification for a contract which can be inferred—pecuniary, moral, or even just a motive—will suffice as cause. See Chloros, The Doctrine of Consideration and the Reform of the Law of Contract, A Comparative Analysis, 17 INT'L & COMP. L.Q. 137, 146 (1968) [hereinafter cited as Chloros]; Keyes, Cause and Consideration in California—A Re-Appraisal, 47 CALIF. L. REV. 74, 99 (1959). Dissatisfaction with some of the formalisms of contract law has brought changes in areas other than consideration. There is increased flexibility in enforcement of the parol evidence rule, the plain meaning rule, the
eration ought not to be enforced unless it serves a function unfulfilled by other aspects of an action—in this instance promissory estoppel. An examination of the reasons for the existence of a consideration requirement will clarify why promissory estoppel should be brought within the realm of contract. The ensuing discussion assesses the functions performed by the formal and substantive requirements of the consideration doctrine and illustrates how the requirements of the promissory estoppel doctrine perform the same functions.

Two functions are served by the requirement that the parties to a contract comply with the formalities of consideration. These functions have been termed "cautionary" and "evidentiary."

The cautionary function acts as a restraining influence; it screens promises made impulsively because legal consequences may not have been intended. This function is accomplished by the requirements of promissory estoppel which impose liability on the promisor only when a reasonable person in the same situation would foresee injurious reliance on the promise. Liability thus is not imposed for breach of impulsive promises made under circumstances in which legal consequences are, or should be, unexpected.

The evidentiary function of consideration might be the crux of the entire doctrine; it supplies evidence to the court that a contract was in fact made. What distinguishes the situations where courts did intervene at early common law is that something more than an informal verbal or written exchange actually transpired between the parties; either there was a ceremonious writing, or the defendant made a promise and caused actual injury to the plaintiff by breaching it, or the defendant had been enriched by the plaintiff. Currently, in a contract action the detriment to the promisee or benefit to the promisor operates to show the existence of the contract. Moreover, several current exceptions to the consideration requirement exemplify the prominent position that the evidentiary function has retained. In California a writing


66. Fuller, supra note 45, at 800. Fuller also mentions a channeling function. Less frequently discussed than the other two functions, channeling involves fitting activity into specific legal categories. Id. at 801-03.

67. Id. at 800.

68. Id. This function helps explain several peculiarities in the development of contract law: (1) The development of liability for malfeasance well before that for nonfeasance, see Farnsworth, supra note 15, at 594-95; see also Boyer, supra note 17, at 669 (delivery of chattel to promisor makes the nature of the reliance capable of demonstration and evidences the particular trust reposed in the defendant); (2) delay of the enforcement of the purely executory bilateral contract until the sixteenth century, see note 41 & accompanying text supra; (3) the development of the actions of covenant and debt prior to special assumpsit, Farnsworth, supra note 15, at 593-96.
is presumptive evidence of consideration in all instances, and, as noted, if there has been a writing no consideration is needed for a release, waiver of the statute of limitations, or modification of an oral contract. Similarly, under the Uniform Commercial Code a firm offer (one which is irrevocable) requires no consideration if in writing. Hence, once the evidentiary function is fulfilled, traditional consideration becomes relatively unimportant.

A bargain serves the evidentiary function well because the process of mutual assent and the purchase of the promise for a price indicate that a contract probably was made. But promissory estoppel also provides the court with sufficient evidentiary grounds for upholding a contract because of the need for a clear promise and actual reliance. Proof of these elements is in all likelihood a sufficiently stringent requirement to prevent the unwarranted invocation of the promissory estoppel doctrine.

The substantive basis for the existence of a consideration requirement involves a policy decision. The problem is to separate those promises that ought to be enforced because of their value to society from those which are of limited social utility. Promises within the context of an exchange, and which consequently satisfy the consideration requirement, are the most worthy of enforcement because the legal relations are created freely and independently by the parties and because the stability of our economic order depends on bargain promises. However, the extension of liability to promises that induce reliance is consistent with other changes in modern contract law that also recognize fairness as a substantive basis of contractual liability. This change of values in the enforcement of promises is exhibited in judicial initiative to prevent fraud or duress, to protect the reasonable expectations of consumers injured by adhesion contracts, to avoid the harsh

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69. CAL. CIV. CODE § 1614 (West 1954).
70. See notes 61-63 & accompanying text supra.
71. U.C.C. § 2-205.
72. This may be one reason why nominal consideration suffices as proof of a bargain, in lieu of an exchange of equivalencies which a true bargain entails. In Blonder v. Gentile, 149 Cal. App. 2d 869, 875, 309 P.2d 147, 151 (1957), the court stated that the validity of the consideration does not depend upon its value, as the law does not ordinarily weigh its quantum. But see Blatt v. University of S. Cal., 5 Cal. App. 3d 935, 944, 85 Cal. Rptr. 601, 607 (1970).
73. Legal enforcement of promises which work an exchange has contributed dramatically to the expansion of a credit economy. See Fuller & Perdue I, supra note 13, at 57-63. Moreover, they foster expectations of profit which our moral sense will not allow to be disappointed. Id. at 57.
effects of mistake,\textsuperscript{77} and to eliminate unconscionable contracts.\textsuperscript{78} The desire generally is to promote "good faith and fair dealing."\textsuperscript{79} Fairness probably has always been a substantive basis of contract law, whether or not mentioned as such. When courts allow almost any change in the promised performance to waive the pre-existing duty rule\textsuperscript{80} and assert that they will not inquire into the adequacy of consideration in the absence of fraud or duress,\textsuperscript{81} they are showing more interest in facilitating the economic plans of the parties than in holding them to abstruse theories of exchange.

Affording contract status to promissory estoppel would not acknowledge the principle of fairness for its own sake, but would invigorate traditional contract principles, as these other variations on the bargain theory have done. Section 45 of the Restatement of Contracts is a cogent illustration of why principles of fairness and bargain complement one another as substantive bases of contract law. This section requires the promisor to hold open the offer for a unilateral contract once the promisee has begun to perform.\textsuperscript{82} The promisor did not bargain for part performance, but fairness requires that revocation of the promise not be allowed at that stage. The principle is the same as that in promissory estoppel: the promisor may be compelled to pay for the detriment induced by the promise, whether or not that detriment was what was wanted.\textsuperscript{83} The effect of section 45 is to stimulate the formation of unilateral contracts because the promisee can safely avoid the manifest danger that always arises in such a transaction. A correlative

\textit{See also} Patterson, \textit{The Interpretation and Construction of Contracts}, 64 Colum. L. Rev. 833 (1964).


\textsuperscript{78} \textit{See} Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960); U.C.C. § 2-302.


\textsuperscript{80} The pre-existing duty rule holds that no consideration exists when one party promises a payment in return for a promise of another to do what that other was already obligated to do. \textit{See} 1 \textit{Corbin, supra} note 16, § 143, at 616-17. The compromise of even a doubtful claim asserted and maintained in good faith constitutes a sufficient consideration for a new promise, even though ultimately it may be found that the claimant could not have prevailed. Khasigian v. Arakelian, 180 Cal. App. 2d 10, 14, 4 Cal. Rptr. 148, 151 (1960).

\textsuperscript{81} \textit{See} McFadden v. Mitchell, 54 Cal. 628, 629-30 (1880).

\textsuperscript{82} "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." \textit{Restatement of Contracts} § 45 (1932). Section 45 is discussed by Justice Traynor in Drennan v. Star Paving Co., 51 Cal. 2d 409, 414, 333 P.2d 757, 759-60 (1958). A case decided on a practically identical principle is Los Angeles Traction Co. v. Wilshire, 135 Cal. 654, 67 P. 1086 (1902).

\textsuperscript{83} \textit{Restatement (Second) of Contracts} § 90 (Tent. Drafts Nos. 1-7, 1973).
effect, allowing promisees to rely on explicit promises, derives from actions based on promissory estoppel.

This correlation between section 45 and promissory estoppel suggests that the substantive basis for promissory estoppel is not as dissimilar to the bargained-for promise as it superficially appears. The protection made available by promissory estoppel is a stimulant to commercial activity because it encourages reliance on promises and motivates promisors to keep their promises.84 The courts are cognizant of this utility of promissory estoppel in business transactions; in fact, the primary application of the doctrine has been in bargain settings where an exchange was contemplated.85 The promise to pay a pension is a typical example of this situation; the promise is not gratuitous but is often made to induce the employee to remain at the job.86 Thus the doctrine has grown from a rule which originally was thought to cover only purely gratuitous promises to a rule potentially applicable in commercial dealings.

Surprisingly, the California Supreme Court has attempted to circumscribe the principle of fairness as a substantive basis of contractual liability by limiting the application of promissory estoppel in exchange contexts. In *Healy v. Brewster*,87 the court declared that promissory estoppel is inapplicable where the promisee’s performance was requested by the promisor at the time the promise was made.88 The *Healy* rule is ironic because the California courts, which to some extent have not applied the rule,89 have led other jurisdictions in the application of promissory estoppel to bargain situations. The seminal decision of *Drennan v. Star Paving Co.*90 led to the adoption of section 89(B)(2) of the second Restatement91 which is directed specifically at the promise

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84. By preventing the unjust harms that can result from reliance, contract law is a catalyst to the risk taking that is an indispensible feature of our economic system. Protection of the reliance interest, therefore, supplements and reinforces the principles upon which bargain theory is grounded. *See generally* Fuller, *supra* note 45, at 811; Fuller & Perdue 1, *supra* note 13, at 61.


88. *Id.* at 463, 380 P.2d at 821, 30 Cal. Rptr. at 133.

89. The two largest classes of promissory estoppel cases contradict the *Healy* rule. The pension cases have not been overruled since *Healy*. The subcontractor cases (of which *C & K* is one) contravene the *Healy* rule even more blatantly than the pension cases. *See* notes 90-95 & accompanying text infra.


91. "An offer which the offeror should reasonably expect to induce action or forbearance of a substantial character on the part of the offeree before acceptance and which does
which seeks a return. The extension of promissory estoppel to bargain settings resulted from the logical observation that there can be as much injustice in a commercial as in a noncommercial situation. It also was realized that the purely gratuitous promise is rare indeed.

Drennan draws attention to the need for promissory estoppel in bargains and to the difficulty of finding a wholly gratuitous promise. Justice Traynor's language exposes the defendant's covert request for the plaintiff's performance:

Though defendant did not bargain for this use of its bid neither did defendant make it idly, indifferent to whether it would be used or not. On the contrary it is reasonable to suppose that defendant submitted its bid to obtain the subcontract. . . . It was to its own interest that the contractor be awarded the general contract. . . . [C]learly defendant had a stake in plaintiff's reliance on its bid.

It is both futile and undesirable to categorically segregate the bargain promise from the gratuitous promise and limit promissory estoppel to the latter. Healy therefore represents one infelicitous attempt by the California Supreme Court unnecessarily to limit fairness as a basis of contract law. C & K is another unfortunate attempt by the court to induce such action or forbearance is binding as an option contract to the extent necessary to avoid injustice.”  


92. Henderson, supra note 13, at 368. "An offer is only one type of promise—the type which is found when the transaction is cast in the context of a bargain and exchange. . . ."

Promissory Estoppel, supra note 51, at 469. Stated more formally, “[a]n offer is an expression by one party of his assent to certain definite terms, provided that the other party involved in the bargaining transaction will likewise express his assent to the identically same terms.” 1 CORBIN, supra note 16, § 11, at 23.

93. Promissory Estoppel, supra note 51, at 492.

94. It is a gross simplification to assume a clean split between those promises which are legally binding and those which are without legal effect. The commercial or noncommercial quality of an agreement is a matter of degree. Fuller & Perdue, The Reliance Interest in Contract Damages: 2, 46 YALE L.J. 373, 396 (1937).

95. 51 Cal. 2d at 415, 333 P.2d at 760.

96. The Healy rule is surprising because it is opposed to the major trends in the doctrine and restricts the application of promissory estoppel more than was contemplated by those who drafted § 90. “The breadth of statement of § 90 has facilitated movement of reliance theory into the realm of bargain.” Henderson, supra note 13, at 353. Promissory estoppel has become an accepted basis of liability in such areas as firm offers, the granting of franchises, and precontractual negotiations in general. See Comment, Once More Into the Breach: Promissory Estoppel and Traditional Damage Doctrine, 37 U. CHI. L. REV. 559, 562 (1970). The Healy rule may express a fear that promissory estoppel will be applied indiscriminately or that it will be confused with the traditional bargain contract. But in view of the intrinsic restrictions worked into the definition, the danger of misuse is minor. There has been so little evidence of unwarranted invocation of the doctrine, despite the expanded application, that the second Restatement of Contracts has deleted the requirement that reliance be definite and substantial. RESTATEMENT (SECOND) OF CONTRACTS § 90 (Tent. Drafts Nos. 1-7, 1973). The second Restatement also substantially broadens the scope of § 90 by
limit the principle of fairness, in this instance by denying contract status to promissory estoppel actions.

**Damages**

An objection to contract status for promissory estoppel often emanates from the supposed distinction in the measure of damages. If noteworthy differences exist, they are more a matter of theory than practice. The policy of the California courts in promissory estoppel cases is to award contract damages—the amount which would place the plaintiff in the position he or she would have been in had the defendant fully performed the promise.97 The award of contract damages in *Drennan* and *C & K* did not provoke the slightest discussion in either case. Justice Tobriner, in *Tomerlin v. Canadian Indemnity Co.*,98 explained that in promissory estoppel cases, "the appropriate remedy lies in the enforcement of the defendant's promise."99 Justice Tobriner concluded that while there are other possible damage measures, a different approach, based on tort rather than contract, would be inequitable.100

The court in *C & K* contrasts damages awarded in promissory estoppel actions with other measures of contract recovery on the basis of a proposed addition to section 90, which states that "[t]he remedy granted for breach may be limited as justice requires."101 The court interprets this sentence, as a result of the discretion it implies, to mean that damages are based upon equitable principles.102 This conclusion is misleading, however. In a comment, the Second Restatement notes that even though a promise binding under section 90 is a contract and full scale enforcement by normal remedies often is appropriate, relief sometimes may be limited to restitution or to damages or specific relief measured by the extent of the promisee's reliance103 rather than by the terms of the promise.104

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99. *Id.* at 649, 394 P.2d at 578, 39 Cal. Rptr. at 738.
102. 23 Cal. 3d at 8, 587 P.2d at 1139, 151 Cal. Rptr. at 326.
103. Reliance damages (sometimes called reimbursement or out-of-pocket damages) attempt to put the plaintiff in the position he or she was in before the promise was made. Fuller & Perdue I, supra note 13, at 54.
104. RESTATEMENT (SECOND) OF CONTRACTS § 90, Comment d at 217-18 (Tent. Drafts...
To state that the measure of damages may be limited is simply to state a well recognized contract principle; under present law trial courts have wide discretion in determining the amount of damages to award for breach of contract. Moreover, neither California decisions nor the Restatement grant courts in promissory estoppel actions liberty to apply any measure which seems proper; many of the general damage standards in promissory estoppel are the same as those in contract. In fact, in one promissory estoppel case a court of appeal held that a trial court has no discretion to apportion the loss on the basis of the equities. The debate over promissory estoppel damages, begun with the first Restatement and stimulated by the second Restatement, is not whether damages should be discretionary, but whether they should be measured exclusively by reliance or by contract standards. Accordingly, the Second Restatement comment need not be read to imply

105. See, e.g., Distillors Distrib. Corp. v. J.C. Millett Co., 310 F.2d 162, 165 (9th Cir. 1962); Cords v. United Slate Tile Roofers, 177 Cal. App. 2d 184, 186, 2 Cal. Rptr. 133, 134-35 (1960). See also Mandoyoma, Inc. v. County of Mendocino, 8 Cal. App. 3d 873, 881, 87 Cal. Rptr. 740, 745 (1970) (reliance damages awarded); Milton v. Hudson Sales Corp., 152 Cal. App. 2d 418, 436, 313 P.2d 936, 947 (1957) (one who breaches a contract cannot escape liability on account of the difficulty of devising a perfect measure of damages for the injury that the wrong has produced). As these cases indicate, there are numerous exceptions to the "normal" rule of contract damages. Fuller & Perdue 1, supra note 13, at 53.

106. The introduction of a new contract rule gave the drafters of the second Restatement an opportunity to make explicit some of the factors which influence normal contract damages. The comment discussed above is based upon a treatise by Fuller and Perdue, who maintain that there should not be a fixed rule of contract damages. These writers also argue that the key premise of Hadley v. Baxendale, 156 Eng. Rep. 145 (Ex. 1854), is "that it is not always wise to make the defaulting promisor pay for all the damage which follows as a consequence of his breach." Fuller & Perdue 1, supra note 13, at 77, 84. Hadley remains the definitive case on the modern law of contract damages. The ruling limits damages to those which the promisor should have foreseen at the time the contract was entered into. See 11 Williston, supra note 13, § 1356, at 289.


108. See Shattuck, supra note 14, at 942. See also Seavy, Reliance Upon Gratuitous Promises or Other Conduct, 64 HAV. L. REV. 913 (1951): "The wrong is not primarily in depriving the plaintiff of the promised reward but in causing the plaintiff to change position to his detriment." Id. at 926.

109. Henderson, supra note 13, at 379: "Identification with contract doctrine is indeed essential if promissory estoppel is to be broadly accepted as a vehicle for protecting the expectation interest." See also Note, Promissory Estoppel—Measure of Damages, 13 VAND. L. REV. 705, 709-12 (1960) (promissory estoppel actions should involve the same measure as in contract actions). Several authorities favor a contract standard which allows for variance to fit unusual cases. See Restatement (Second) of Contracts § 90, Comment d at 217-18 (Tent. Drafts Nos. 1-7, 1973); 1A CORBIN, supra note 16, § 205.
that the potential for limiting damages calls for the exercise of powers available only in equity.

If the supreme court wishes to adopt more flexible remedies it can find sufficient justification in principles of law without any resort to equity. *Hadley v. Baxendale* is an example of discretion in legal actions; it mitigates the rigid approach to contract damages which, at least in theory, prevailed at common law. Along these lines, Professor Corbin explains the historical discretionary power possessed by courts at law:

> The fact is that the courts of common law had as much power over their money judgments as did the courts of Chancery... they exercised as great control over the amount of money awarded as damages for breach... [The courts] can properly justify their actions by an appeal to their equitable powers inherited from the Chancellor; but it is believed that such an appeal is unnecessary. The courts are still courts of justice; and justice, though not dependent on the length of the Chancellor's foot, has always been dependent on the circumstances of the individual case. This is especially true with respect to the form and extent of the remedy to be applied.

This discretion, long recognized and exercised, strongly suggests that courts of law are well equipped to apply section 90, including the proposed amendment. If the general policy of the California courts is to apply a contract measure of damages, then promissory estoppel should be brought within contract law. Commentators who argue that promissory estoppel should be separated from contract do so not because they believe the two actions are dissimilar, but because they favor damages measured by reimbursement. Generally, it is the earlier commentators who favor a reliance measure; those who have witnessed the expansion of the doctrine favor contractual measures.

Finally, if in a few cases promissory estoppel damages are measured other than by the expectation interest, this does not mean the action is noncontractual. The overriding goal of contract damages is to compensate the plaintiff; this usually, but not necessarily, results in expectation damages. Moreover, the award of expectation damages

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111. C. McCormick, Handbook of the Law of Damages § 138, at 563-64 (1935): "[O]ne who failed to carry out his contract was, so far as legal theory went, liable for any and all resulting loss sustained by the other party, however unforeseeable such loss may have been." In practice, however, the approach to contract damages was rather flexible. See note 112 & accompanying text infra.
112. 1A Corbin, supra note 16, § 205, at 236.
as compensation can only approximate a plaintiff's estimated loss, since
the plaintiff never had that which the law considers necessary for com-
ensation. By bringing promissory estoppel within contract law, these sometimes arbitrary reasons underlying contract damages would
be subject to greater scrutiny and perhaps be made more equitable. At
the same time, courts would be less reluctant to award promissory es-
toppel plaintiffs expectation damages where they are deserved.

Promissory Estoppel and Equitable Estoppel

With labels so much alike it is easy to see why promissory estoppel and equitable estoppel are still sometimes discussed as if they are slight variations of the same legal principles. The court in C & K stresses this
connection in support of its classification of promissory estoppel as eq-
utiable by comparing a promissory estoppel action to an action based
upon the analagous principle of equitable estoppel. This analogy be-
comes central to the court’s decision as the latter may be tried by the
court without a jury. An examination of the components of the doc-
tines reveals, however, that the analogy is less direct than it seems.

An equitable estoppel must involve a false statement or conceal-
ment as to present or past facts. In contrast, promissory estoppel
only arises if there is an explicit promise pertaining to the
future. Equitable estoppel is used defensively to maintain the status quo; promissory estoppel creates an affirmative contract right. Promis-
sory estoppel is used in reference to the formation of a contract; equita-
ble estoppel pertains to the performance of a contract. Equitable
estoppel is not favored by the law because it prevents assertion of the

115. Expectation damages are awarded, at least in part, because they can be ascertained
with greater certainty, they are most likely to compensate the plaintiff's reliance, and they
deter carelessness by severely punishing the promisor. Fuller & Perdue 1, supra note 13, at
60-61. If these policies, all of which figure heavily in promissory estoppel cases, can some-
times be accomplished best by applying alternative damage measures, there seems no reason
not to do so.

116. 23 Cal. 3d at 9, 587 P.2d at 1140, 151 Cal. Rptr. at 327.
117. Id. The court failed to mention that equitable estoppel is available in actions at
3d 404, 411, 105 Cal. Rptr. 602, 606 (1972); Moss v. Bluemm, 229 Cal. App. 2d 70, 72-73, 40
Cal. Rptr. 50, 52 (1964).
2d 624, 630, 36 Cal. Rptr. 798, 802 (1964); Bruce v. Jefferson Union High School Dist., 210
120. See note 34 & accompanying text supra.
122. See Meyer v. Glenmoor Homes, Inc., 246 Cal. App. 2d 242, 267, 54 Cal. Rptr. 786,
803 (1966).
123. CALAMARI & PERILLO, supra note 32, § 11-34, at 445.
truth; there is no such policy against the use of promissory estoppel. Finally, absent culpable negligence, the defendant in equitable estoppel cases must have actual or virtual knowledge of the falsity of his or her representations and must intend that the plaintiff rely thereon; the standard of conduct of the promissory estoppel defendant is much closer to that of the breaching contractual promisor: negligence or bad faith are irrelevant and he or she need not have intended to deceive the plaintiff.

As this listing of requirements indicates, the conduct of the parties in promissory estoppel actions can be evaluated more effectively by the objective theory of contracts. The issues are whether the promisor should have reasonably foreseen reliance and whether the promisee was reasonable in relying; in equitable estoppel the issues concern the fraud of one party and the clean hands of the other. In addition, an analysis of the three authorities relied on by the court in C & K shows that these authorities likewise viewed promissory and equitable estoppel as distinct concepts which should be treated differently.

Professor Williston first popularized the term promissory estoppel, but he did not emphasize its connection with estoppel theory. And, although he was responsible for section 90 of the Restatement of Contracts, that section does not employ the term at all. The second authority, Corbin, is cited by the C & K court for the proposition that one of the sources of promissory estoppel is flexible use of estoppel in equity, a dubious source of support as Corbin objected to the phrase promissory estoppel altogether because of the connection with estoppel doctrine which it implied. Furthermore, the C & K opinion relies heavily on a treatise by Professor Henderson for its conclusion that

130. In a one sentence explanation of the term "promissory estoppel," all Williston said was that "since [the promisee] relies on a promise and not on a misstatement of fact, the term 'promissory estoppel or something equivalent should be used to mark the distinction." 1 WILLISTON, supra note 13, § 140, at 607-09.
132. 23 Cal. 3d at 7, 587 P.2d at 1139, 151 Cal. Rptr. at 326.
133. 1A CORBIN, supra note 16, § 204, at 232-33.
promissory estoppel is exclusively within equity. Henderson, however, advocates that the doctrine be extricated entirely from its sources in equity and estoppel. He argues that only by such separation will promissory estoppel gain its deserved identity and that general equitable principles should not modify the requirements of section 90. This identity will come about if promissory estoppel is associated with contract law; only then, Henderson contends, will the proper measure of damages be awarded.

In Conclusion: The Case for Promissory Estoppel as a Contract Action

Promissory estoppel has exhibited remarkable resiliency and growth despite its inability to find a fixed location in the law. As noted, the origins of the doctrine are traceable to the earliest actions in assumpsit. As the consideration doctrine ascended to prominence, however, the promise enforced solely because of reliance became peripheral in contract law. By the nineteenth century the bargained-for promise had virtually eclipsed all others; a need for alternative grounds for enforcement of promises then arose. Unbargained-for promises were enforced in specific kinds of cases, but no general principle emerged until 1932.

In that year the Restatement of Contracts “codified” the doctrine of promissory estoppel. Section 90 immediately gained favor in the courts and probably is the most widely discussed section of the Restatement. Notwithstanding the Restatement’s characterization of promissory estoppel as contract, the doctrine has been given various other appellations, such as “equitable doctrine” by the C & K court. As shown by the decision in C & K, the label affixed is of much more than academic significance; it can have a crucial bearing on the standard of conduct, the measure of damages, the right to jury trial, and the acceptance of the doctrine generally.

Categorizing an action based on promissory estoppel as anything other than a contract action at law would cause it to be misconstrued. The theory of the rights and duties contrasts sharply with tort, as does the measure of damages. There is a resemblance to quasi-contract because literally they are both situations where in equity and good con-
the defendant should pay the plaintiff. But promissory
estoppel would be submerged by such a connection because the policy
behind promissory estoppel is not as strong; in quasi-contract not only
has the plaintiff been unjustly impoverished but the defendant also has
been unjustly enriched.

As a sui generis action, promissory estoppel would be susceptible
to being called an action which “sounds” in some other doctrine. If
correlated with equitable estoppel or defined as an independent equita-
ble doctrine, promissory estoppel could be exposed to a wide range of
dangers—the standard of conduct could change, there could be less
tendency to award expectation damages, the action could be considered
extraordinary and, as shall be examined in the second part of this Note,
the right to jury trial would be denied.

The evolution of promissory estoppel is characterized by its affin-
ity to both classic and contemporary contract principles. The courts
often discuss promissory estoppel in contract terms, and apply con-
tractual concepts. The decisions discuss promise, consideration, mis-
take, mitigation of damages, and third party rights. The result as well as
the logical process is the same as in breach of contract: enforcement of
the promise and contractual measures of damages.

Judicial receptivity to promissory estoppel in the twentieth century
is consistent with other expansions of civil liability in a society which is
becoming more economically and socially interdependent. As noted
by a California Court of Appeal in justifying a broadened application
of promissory estoppel, the law has not stood still, the morals of the
marketplace have changed, and today stricter standards of good faith
and fair dealing are imposed. Hadley v. Baxendale was a pioneer
case in this judicial attempt to reconcile the necessities of the market
with contemporary morality and the decision provided an initial stan-
dard for determining where contractual liability ends. In similar
fashion promissory estoppel is a modern redefinition of where contrac-
tual liability begins.

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141. See Mains v. City Title Ins. Co., 34 Cal. 2d 580, 586, 212 P.2d 873, 876 (1949);
142. See notes 26-29, 46-49, 65 & accompanying text supra & notes 143-47 & accompa-
nying text infra.
143. See note 34 & accompanying text supra.
144. See note 60 & accompanying text supra.
146. Id. at 417, 333 P.2d at 761.
147. See note 95 supra.
148. See Fuller, supra note 45, at 823. See generally Kessler, Contracts of Adhesion—
151. See Fuller & Perdue 1, supra note 13, at 85.
Those who would deny contract status to promissory estoppel inevitably return to the absence of consideration as the rationale for a distinction. This argument is vitiated by the understanding that the doctrine can be understood only in terms of “its history and the society that produced it.”\(^{152}\) In this light, one can understand why there is no consideration requirement in Europe,\(^{153}\) why the English Law Revision Commission has recommended its abolition,\(^{154}\) and why it did not exist at early common law. In the eighteenth century, Lord Mansfield deemphasized consideration in favor of moral obligation as the primordial source of contract liability.\(^{155}\) During the era of laissez-faire capitalism in the nineteenth century, however, the consideration doctrine was supreme.\(^{156}\)

In the twentieth century there has been an uneven retreat from the bargain theory of contract. Exceptions such as promissory estoppel are recognized, but these exceptions often are relegated to the outskirts of the law. Perhaps this reflects the uncertain state of our morality. The contention here is that promissory estoppel should be brought within the mainstream of contract law. Both contract law and society would benefit.

The Right to Trial by Jury

The constitutional right to trial by jury in civil actions in California,\(^{157}\) as interpreted by the supreme court,\(^{158}\) guarantees the right as it existed at common law in 1850 when the constitution was adopted. Under this interpretation, trial by jury is a matter of right in civil actions in law but not in equity.\(^{159}\) This distinction, however, often presents problems of interpretation regarding both traditional and newly created actions because California procedure merges law and eq-

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152. Farnsworth, supra note 15, at 599.
154. See Calamari & Perillo, supra note 32, § 4-1, at 133; Chloros, supra note 65, at 144.
155. See note 25 supra.
156. See note 15 & accompanying text supra.
157. Cal. Const. art. 1, § 16. The seventh amendment of the United States Constitution, which guarantees the right to trial by jury in civil actions in federal courts, has been held inapplicable to actions in state courts. Walker v. Sauvinet, 92 U.S. 90, 92 (1875).
uity.\textsuperscript{160}

In \textit{People v. One 1941 Chevrolet Coupe},\textsuperscript{161} the leading case on the distinction between law and equity for trial by jury purposes, the supreme court concluded:

If the action has to deal with ordinary common-law rights cognizable in courts of law, it is to that extent an action at law. In determining whether the action was one triable by a jury at common law, the court is not bound by the form of the action but rather by the nature of the rights involved and the facts of the particular case—the gist of the action. A jury trial must be granted where the gist of the action is legal, where the action is in reality cognizable at law.\textsuperscript{162}

The court in \textit{One Chevrolet} added, however, that in determining whether the gist of the action is legal, “[t]he right to trial by jury cannot be avoided by merely calling an action a special proceeding or equitable in nature,”\textsuperscript{163} the constitution “is not to be narrowly construed,”\textsuperscript{164} and the right “is not limited strictly to those cases in which the right existed before the adoption of the Constitution but is extended to cases of a like nature as may afterwards arise.”\textsuperscript{165} Thus qualified, the test enables the right to grow with changing circumstances. It directs courts to penetrate the surface of the law-equity dichotomy and consider the purpose of each. The test thus furnishes a specific instrument through which the right can be extended to new actions.

Nevertheless, there are historical and functional problems with the \textit{One Chevrolet} test. It fails to acknowledge that the right to jury trial at common law was constantly evolving and often rested on arbitrary distinctions; it was not a fact which could “be ascertained like any other social, political, or legal fact.”\textsuperscript{166} The test obscures the historical practice of basing the law-equity division largely on the remedy sought\textsuperscript{167} and often compels courts to undertake a cumbersome theoretical analysis of legal and equitable rights in a way that does not accurately reflect the historical basis of the distinction. This problem is highlighted in \textit{C & K} where the court emphasized an element of the distinction—the


\textsuperscript{161} 37 Cal. 2d 283, 231 P.2d 832 (1951).

\textsuperscript{162} \textit{Id.} at 299, 231 P.2d at 843-44 (footnote omitted) (adopting lower court opinion as modified).

\textsuperscript{163} \textit{Id.} at 299, 231 P.2d at 843.

\textsuperscript{164} \textit{Id.} at 300, 231 P.2d at 844.

\textsuperscript{165} \textit{Id.} at 299-300, 231 P.2d at 843-44.

\textsuperscript{166} \textit{Id.} at 287, 231 P.2d at 835.

quantum of equitable principles involved—which was not decisive in determining the right at common law. An examination of the history of the English system and of developments in California practice will reveal why the court in C & K exacerbated the problems with the gist of the action test and why the test should be abandoned. A remedy test will be proposed, with the sole qualification that in unusually complex cases the court should deem the action equitable. Finally, there will be a discussion of why trial by jury is preferable for promissory estoppel actions.

Historical Background of the Right to Jury Trial

The historical fluctuation of the scope of legal and equitable jurisdiction makes difficult any attempt to isolate specific equitable principles, except in very general terms. Equity developed to alleviate the inadequacies of the common law courts which had rigid procedural rules and were slow in creating new rights and remedies. The popularity of the equity courts, however, stimulated the law courts to expand the common law forms of action and eventually many issues which once were cognizable only in equity moved over into law or were treated concurrently. Each court borrowed liberally from the other.

This evolution was particularly striking in the area of enforcement of promises. The action of assumpsit developed in the law courts after equity began to enforce unsealed written promises and oral promises; previously, the only purely contractual action at law was the action of covenant which lay exclusively on a sealed writing. Courts of equity usually had no different standard for determining what constituted a contract than did courts of law, and eventually the law courts had jurisdiction over all actions for enforcement of promises, the equity courts intervening only where damages at law were inadequate.

168. 23 Cal. 3d at 6, 587 P.2d at 1138, 151 Cal. Rptr. at 325.
170. Id. at 279-83.
171. Note, The Right to a Nonjury Trial, 74 Harv. L. Rev. 1176, 1182 (1961) [hereinafter cited as The Right to a Nonjury Trial].
172. James, Right to a Jury Trial in Civil Actions, 72 Yale L.J. 654, 658 (1963) [hereinafter cited as James].
173. Id.
174. 5 Holdsworth, supra note 169, at 294-97.
175. 1 Williston, supra note 13, § 100, at 372.
176. See Farnsworth, supra note 15, at 592; Langdell, A Brief Survey of Equity Jurisdiction, 1 Harv. L. Rev. 355, 362-67 (1888): "It is a tribute to the ingenuity and flexibility of the common law judges that they succeeded in moving fast enough to stay the Chancellor's hand so that credit for the development of the general basis for the enforcement of promises that we know today was theirs and theirs alone."
Logically, then, if promissory estoppel had existed in 1850 it would have been triable at law if damages were sought. Moreover, in the growth of quasi-contractual relief the seemingly contradictory situation developed where the law courts had jurisdiction over actions where in equity and good conscience the defendant was required to pay the plaintiff. At least one chancellor encouraged this incorporation of equitable principles by the law courts because he was more interested in bringing about new standards of conduct than in preserving equity jurisdiction.

The jurisdictional division thus was characterized not only by constant evolution, but also by differences which are either irrelevant now or were arbitrary then. Each court had a different manner of proof and a plaintiff had to take the rules of one or the other as a package. The parties' choice of forum thus depended on their procedural preference, and the use of a jury trial was simply one feature of the legal package. As joinder of legal and equitable claims was impossible in the law courts, the "clean-up doctrine" developed in equity enabling equity courts to retain jurisdiction over otherwise legal issues. Competition between the courts resulted in equity needlessly retaining jurisdiction over cases which had become actionable at law. All of these factors suggest that there is insufficient historical foundation for classifying actions as inherently equitable or legal.

The reasons for the existence of a non-jury trial in equity had even less to do with the parties' needs or with justice than the reasons why an action was tried in one of the two forums. The early chancellors func-

177. Modern courts often use deductive reasoning, such as that employed here, to determine whether a new action is analogous to a legal or equitable action under the English system. See Redish, supra note 167, at 491.

178. The Supreme Court noted this development in Gaines v. Miller, 111 U.S. 395 (1884): "Whenever one person has in his hands money equitably belonging to another, that other person may recover it by assumpsit for money had and received. . . . The remedy at law is adequate and complete." Id. at 397-98 (citations omitted). See also Philpott v. Superior Court, 1 Cal. 2d 512, 518-24, 36 P.2d 635, 638-40 (1935); James, supra note 172, at 658.

179. See The Right to a Nonjury Trial, supra note 171. Sir Thomas More, a chancellor in the fifteenth century, took the initiative and personally invited the law judges to apply equitable principles. See T. Plucknett, A Concise History of the Common Law 687 (5th ed. 1956) [hereinafter cited as PLUCKNETT].

180. James, supra note 172, at 662.

181. This is a procedural device to which the chancellor could resort whenever equity had jurisdiction of a cause of action for any reason. It entitled the chancellor to decide all issues in a dispute, legal and equitable, so that there would be an effective termination of the entire controversy. Clean-up avoided multiplicity of suits and incomplete justice. See 1 J. Pomeroy, A Treatise on Equity Jurisprudence § 181, at 257-58 (5th ed. 1941). See also James, supra note 172, at 658-59.

182. See James, supra note 172, at 659. See also Eyre v. Everett, 38 Eng. Rep. 379 (Ch. 1826). To some extent, the division was a product of the competition between the King and Parliament. James, supra note 172, at 663.
tioned as administrators rather than as judges, and equity was not even a court initially. The chancellor probably lacked the resources necessary for conducting a jury trial even if he had wanted one. It also seems likely that, as a representative of the king's conscience, the chancellor did not believe that a jury had the right to supersede the will of the king. Moreover, the chancellor's assessment of the jury's competence to hear a particular case had only limited affect on his decision to assume jurisdiction, although complexity probably was determinative in the classification of certain actions such as class suits, multiparty suits, and corporate claims. The discretionary nature of a damage remedy similarly did not dictate that the action be tried in equity; in fact early common law juries had more discretion in some respects than those of today. This history explains why eminent jurists have stated that there are no inherently legal or equitable issues. It also explains how the One Chevrolet gist of the action test, by focusing on the nature of the rights involved, does not adequately take into account the difficulty of analyzing modern actions in terms of historical law-equity distinctions.

Current Status of the Right to Trial by Jury

A look into the current status of trial by jury will reveal that the C & K method of distinguishing law from equity is even more unreliable when applied under modern California procedure than when it is applied to history. Equity jurisprudence in California continues its traditional function of providing relief to the plaintiff who cannot obtain adequate or complete relief at law. The absorption of equitable principles into legal actions has increased, however, stimulated by the merger of law and equity which has abolished formal distinction and

183. See Plucknett, supra note 179, at 163-64.
184. See generally id. at 209-10.
185. James, supra note 172, at 661.
186. Redish, supra note 167, at 529. As Redish perceptively observes, the misconception that because a remedy is discretionary it is equitable may derive "from the general policy that equity acts at the chancellor's discretion." It does not follow that all discretionary relief is necessarily equitable. Id.
187. "In 1789, juries occupied the principal place in the administration of justice. They were frequently in both criminal and civil cases the arbiters not only of fact but of law." Galloway v. United States, 319 U.S. 372, 399 (1943) (Black, J., dissenting) (footnote omitted).
established one form of civil action.\textsuperscript{190} The forum, form of action, and mode of proof are no longer factors which can distinguish between an action at law and one in equity. Even the California Supreme Court has said the distinction "is more or less arbitrary and groundless."\textsuperscript{191} Thus, while merger has simplified civil procedure, it often has complicated the determination of the right to trial by jury in situations where the boundary between law and equity is not readily ascertainable.

In such cases where the line between law and equity is unclear California courts have employed principles which effectively favor the right to trial by jury. An example of these principles is that a plaintiff must exhaust all legal remedies before seeking relief in equity.\textsuperscript{192} Another such principle is that "only where the issues to be tried are exclusively equitable in nature"\textsuperscript{193} will a jury trial be denied.

Other principles that favor the right to trial by jury are more subtle, but also more important. One is that the nature of a cause of action ordinarily is determined by the type of relief to be afforded.\textsuperscript{194} This principle seems to be neutral but is not. On the one hand equity formerly had jurisdiction of all cases in which equitable remedies were sought and in several in which legal damages were requested, such as accountings and corporate suits. On the other hand the constitutional right to jury trial was once thought to extend only to those cases that could be tried to a jury at common law.\textsuperscript{195} With the remedy guiding the courts, as it has in California, there can be a right to trial by jury whenever damages are sought, even if the action is newly created by statute.\textsuperscript{196} Hence, the effect of classifying actions by the remedy sought has been to broaden the range of legal jurisdiction. Even without a direct analogy to a pre-1850 common law action jury trial is potentially a matter of right.

\textsuperscript{190} See note 160 & accompanying text supra. "[W]here there is a merger of law and equity and a single forum is theoretically capable of taking cognizance of all rights, both legal and equitable, a so-called equitable right may be enforced in a court of law." Offer v. Superior Court, 194 Cal. 114, 122, 228 P. 11, 14 (1924).

\textsuperscript{192} See Ripling v. Superior Court, 11 Cal. 3d 665, 672, 517 P.2d 1157, 1160, 111 Cal. Rptr. 693, 696 (1974).
Moreover, the classification of an action by the relief requested is not prevented by the use of equitable principles in that action; as the court in *C & K* concedes,\(^\text{197}\) the application of equitable principles does not necessarily identify the action or resultant relief as equitable.\(^\text{198}\) If this policy were otherwise then the plaintiff who sought damages could not get a jury if his or her cause involved equitable principles. Significantly, the cases illustrate that the policy of classifying actions by the relief sought preempts a classification based on the principles employed.\(^\text{199}\)

Accordingly, in *Paularena v. Superior Court*\(^\text{200}\) it was held that the gist of the action is determined by the nature of the relief requested even though this resulted in a court of law applying what are thought to be equitable principles—contract rescission and an accounting between the parties. The court remarked that despite the complicated issues and problems with the judgment to be entered, both of which could have been avoided if the trial were by the court, jury trial remained a matter of right and not a matter of discretion.\(^\text{201}\) Hence, in this case, as in others, the classification based on the remedy overcame factors that might have put the case in equity, such as complexity of the issues, limits of the jury, use of equitable principles, or historical location of the action.

Courts classify actions by the remedy chiefly because that was the custom under the English system,\(^\text{202}\) but another reason for doing so derives from the judicial practice of redefining equity in terms of the inadequacies of the legal system as it presently exists.\(^\text{203}\) The practice, which has strongly influenced the right to trial by jury, can be discerned in certain pronouncements of the courts, such as: “to give a proper classification to a cause of action we should seek to find its counterpart in the history of the English law *in the light of such modifications thereof as have taken place under our own system.”\(^\text{204}\) Because

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197. 23 Cal. 3d at 10, 587 P.2d at 1140, 151 Cal. Rptr. at 327.
199. As the supreme court has declared, the distinction between law and equity “lies more in the relief administered than in the principles applied.” McCall v. Superior Court, 1 Cal. 2d 527, 537, 36 P.2d 642, 647 (1934).
201. Id. at 914, 42 Cal. Rptr. at 371.
202. See note 167 & accompanying text supra.
203. For example, the United States Supreme Court has noted that the availability of traditional equitable remedies must be reconsidered in view of the Declaratory Judgment Act and the liberal joinder provisions of the Federal Rules of Civil Procedure. Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 509 (1958).
204. Philpott v. Superior Court, 1 Cal. 2d 512, 516, 36 P.2d 635, 637 (1934) (emphasis
the formal distinctions have been abolished the only major inadequacy
of the law now is that it does not administer the specific equitable rem-
edies; hence an action seeking relief available at law can be classified as
legal on that ground alone.

Ascertaining the right to trial by jury by the remedy is the most
important manifestation of the redefinition of law and equity in terms
of modern procedure, but there are other examples. One example per-
tains to judicial rulings that issues in a given case must be separately
identified so that trial by jury can attach to those issues which are suita-
ble for a jury. This practice originated at common law, where in a
certain class of cases the chancellor refused to grant relief until after a
preliminary legal issue had been determined at law by a jury.205 It has
been extended in California, facilitated by the unification of the courts.
A request for injunctive relief is typical; it may be required that the
right to an injunction be established at law before the injunction will be
granted in equity.206

Actions where the jurisdictions of law and equity have become
concurrent supply another example of the readjustment of the bounda-
ries between law and equity. In matters which were formerly in equity
the courts have found that the context in which the action arises (invari-
ably meaning the form of relief sought) determines the nature of the
action. Concurrent jurisdiction applies to actions such as fraud,207 ac-
countings,208 equitable estoppel,209 and rescission of contracts.210 A
paradigmatic instance of where the right to jury trial has broadened
through the recognition of concurrent jurisdiction concerns declaratory
judgment actions. These actions are usually characterized as equitable
because the plaintiff seeks a specific form of relief, rather than dam-
ages. Yet the California Supreme Court has ruled that the Declaratory
Relief Act cannot be used to circumvent the right to trial by jury in
cases where such right would be guaranteed if the proceedings were
coercive rather than declaratory in nature.211 The granting of jury tri-

205. James, supra note 172, at 669-72.
207. See Philpott v. Superior Court, 1 Cal. 2d 512, 36 P.2d 635 (1934).
209. See note 117 supra.
210. See McCall v. Superior Court, 1 Cal. 2d 527, 36 P.2d 642 (1934).
211. State Farm Mut. Auto. Ins. Co. v. Superior Court, 47 Cal.2d 428, 432, 304 P.2d 13,
Interinsurance Exch. v. Savior, 51 Cal. App. 3d 691,124 Cal. Rptr. 239 (1975) (declaratory
relief substituted for breach of contract action).
als in declaratory relief actions is a reminder that the right to a jury when damages are sought should be only a minimum standard; more generally, it is a reminder of the impact on the right to jury trial of the practice of defining equity by the limitations of law.

The continued existence of the equitable clean-up doctrine has provided a fertile battleground for opponents and proponents of the civil jury. Accordingly, the present status of the doctrine in California is a barometer of how far the courts have gone in reinterpreting the right to trial by jury. The equitable clean-up doctrine was an invaluable device at common law for preventing multiplicity of actions.\textsuperscript{212} Merger of law and equity and liberal joinder rules, however, have eviscerated the sound policy reasons which once were behind it. The doctrine stubbornly persisted in California, but more recently has been eroded. When presented with equitable and legal claims and defenses courts for years would characterize the entire case as essentially equitable and decide all issues without a jury,\textsuperscript{213} although the issues could be tried separately without the anathema of multiple suits. The more logical view, which is now predominant, is that "[w]here legal and equitable remedies are demanded in the same action, each remedy is governed by the same law that would apply to it if the other remedy had not been requested."\textsuperscript{214} This view extends the right to jury trial, pursues the policy of granting jury trial whenever damages are sought, and redefines equity by modern standards.

This barometer suggests, however, that the right to jury trial in California has not been extended to the limits that modern procedure would allow; the extensions brought about by the remedy principle and the redefinition of equity represent a tendency rather than a firm rule. For example, when presented with legal and equitable issues the court has discretion to determine the order of trial, even if the issues involve common questions of fact.\textsuperscript{215} The policy has been for the court to try the equitable issues first,\textsuperscript{216} as a result of which the litigants may be denied a jury trial on the legal issues because of collateral estoppel or

\textsuperscript{212} See note 181 & accompanying text supra.

\textsuperscript{213} See, e.g., Proctor v. Arakelian, 208 Cal. 82, 280 P. 368 (1929); Mesenburg v. Dunn, 125 Cal. 222, 57 P. 887 (1899).

\textsuperscript{214} Crouser v. Boice, 51 Cal. App. 2d 198, 200, 124 P.2d 358, 360 (1942) (even though the action is essentially equitable, if the plaintiff requests legal relief, the parties are entitled to a jury trial on the legal issue). See Pacific W. Oil Co. v. Bern Oil Co., 13 Cal. 2d 60, 68-69, 87 P.2d 1045, 1049-50 (1939); Hutchason v. Marks, 54 Cal. App. 2d 113, 119, 128 P.2d 573, 576 (1942).

\textsuperscript{215} Raedeke v. Gibraltar Sav. & Loan Ass'n, 10 Cal. 3d 665, 671, 517 P.2d 1157, 1160, 111 Cal. Rptr. 693, 696 (1974).

This policy is in direct contrast to the rule in federal courts, where almost all order of trial problems must be resolved in favor of the right to trial by jury. There may be legitimate reasons for the state rule, such as the need for judicial economy and the problem of frivolous legal claims dominating the action, but it still represents a limitation on jury trial. Although California courts have not removed these limitations to date, the trend nonetheless has been toward expanding jury trial rights.

The C & K court aligned itself against the prevailing pro-jury trend in California. The court did not analogize to cases of concurrent jurisdiction, although it would be logical to grant a jury trial to a plaintiff who seeks damages under promissory estoppel while denying jury trial if equitable relief is sought. The court did not even consider dividing the issues of liability and assessment of damages. The court instead forged an analogy to the case of Southern Pacific Transportation Co. v. Superior Court, an action brought under the good faith improver statute which permits damages or other relief to persons who, in good faith, improve property owned by others. The plaintiff in Southern Pacific sought only damages, but the court concluded that a claim brought under the statute was equitable because the language of the statute invited the court to “effect such an adjustment of the right, equities and interests’ of the parties as is consistent with substantial justice.”

The court in Southern Pacific admitted that classification of an action usually depends on the relief sought and that a jury trial generally is allowable on the legal issues, but it interpreted the statute to necessarily involve inseparable requests for both legal and equitable relief. Accordingly, a jury was not a matter of right, because the jury might have been required to decide upon equitable relief. The claim in C & K was analogous because the jury in promissory estoppel also must (at least figuratively) “adjust the equities” between the parties. The crucial difference, ignored by the C & K court, is that in C & K the

221. 58 Cal. App. 3d at 437-38, 129 Cal. Rptr. at 915.
222. Id.
223. The court also perceived a legislative disinclination to allow a jury trial under the statute. Id. at 438, 129 Cal. Rptr. at 915.
jury was capable of making the "adjustment" because it involved only the claim for damages. As a result, the C & K court unnecessarily classified the action as equitable, thereby effectively restricting the jury trial right.

The California Constitution and the Right to Trial by Jury

The state constitutional right to trial by jury has been upheld by California courts through the policies mentioned above and through specific rules which declare, for example, that wrongful denial of jury trial constitutes a miscarriage of justice and that the legislature may not, directly or indirectly, deprive a litigant of the right to a jury trial through creation of statutory actions or special proceedings. A strong state policy in favor of jury trial was set forth in one of the first cases ever decided by the California Supreme Court. In Payne v. Pacific Mail S.S. Co., Chief Justice Hastings proclaimed that "it is the duty of this court to remove every obstacle from a free exercise of its [trial by jury] right ...." Considering this constitutional and historical preference, it is ironic that the C & K court construed legal jurisdiction and the right to trial by jury narrowly while equity jurisdiction, unsupported by any similar constitutional imperative, was afforded broad scope.

The complex constitutional issue raised in C & K is the extent to which judicial interpretation can affect the constitutional guarantee. There is some historical precedent which supports a narrow interpretation of that guarantee. Provision for a civil jury in state courts was not included in the original Bill of Rights mainly because of the discrepancy in procedures among the original states, but also because a civil jury was not considered essential to liberty. The United States Supreme Court has held that the right to civil jury trial is not a fundamental right and privilege of United States citizenship and thus not protected from state infringement by the fourteenth amendment.

224. CAL. CONST. art. 1, § 16.
226. See note 165 & accompanying text supra.
228. 1 Cal. 34 (1850).
229. Id. at 37.
232. Walker v. Sauvinet, 92 U.S. 90, 92 (1875). In opposition to the majority view, ten justices have felt that the due process clause of the fourteenth amendment protects from
deed, it is considered possible for a state to abolish the civil jury altogether without raising federal constitutional problems.\textsuperscript{233} Finally, a policy reason for the existence of the civil jury in federal actions—to prevent abuses by a powerful government—is not as compelling in state court actions.

In addition to this historical precedent, critics of jury trial have avowed that the jury lacks the competence to perform its task.\textsuperscript{234} Further, they contend that even if a civil jury is minimally competent the advantages gained from a jury trial may not be worth the delay because the policy beyond civil juries is not as strong as that supporting the right to a jury trial in criminal cases.\textsuperscript{235} Whatever legitimacy some of these historical and practical arguments have, they cannot overcome the command of the California Constitution. As noted by Justice Traynor, practical reasons for adopting new procedures are immaterial if they impair the right to trial by jury.\textsuperscript{236} As a result there may be no alternative to interpretations that extend rather than freeze or limit this right. Since most civil actions have been created since 1850,\textsuperscript{237} if the right was not extended it would exist only in a minority of cases, and in such circumstances it could not accurately be called an inviolate right.

If the California Supreme Court is to take seriously its rule that the constitutional right to jury trial is the right as it existed in 1850, its interpretation of the law-equity division cannot ignore that by 1850 there had been great intermingling of law and equity. Chancery was sending issues to the common law courts to be tried by jury, and the law courts were applying the procedures and doctrines of chancery.\textsuperscript{238} Two nineteenth century acts represent the culmination of this process of unification which had accelerated during the eighteenth and early nineteenth century: the Common Law Procedure Act of 1854, which required chancery to hear oral evidence and use a jury while "common law courts, on the other hand, were empowered to grant injunctions, to compel discovery, and to admit equitable defenses;"\textsuperscript{239} and the Judica-
ture Acts which fused the courts of law and equity in 1873. 240

If the federal Constitution guarantees the right to trial by jury as it existed in 1791 while California guarantees the right as of 1850, there is a valid argument for a broader right under the California Constitution. 241 When the United States Supreme Court says that improvements in the law affect the scope of equity, 242 California courts can hardly avoid the logic even if they are not bound by the holding, since by 1850 the law was so improved that equity had almost lost its autonomy. Interpretation of the right to jury trial can ignore neither the constitutional directive nor the historical pattern; accordingly, the potential for judicial intrusion of the courts after C & K into that constitutional right cannot be dismissed lightly.

Jury Trial As a Matter of Right When the Plaintiff Seeks Money Damages

The dissenting opinion by Justice Newman in C & K urges adoption of the basic rule that would assure a right to trial by jury when the plaintiff seeks money damages. 243 California courts now largely follow this suggestion as a matter of discretion, but the implications of the holding in C & K make it desirable to affirm such a standard as a rule. Because equitable principles continue to be assimilated in legal actions, the effect of a test that characterizes actions by the principles employed will be to expand the domain of equity at the expense of law, with a corresponding decline in the right to jury trial. For example, restitution long has been considered an action at law although it rests on principles of equity and natural justice. 244 A strict application of C & K could transfer it to equity because it rests on equitable principles. As one highly respected commentator has stated, there is no justification for this expansion of legal relief in equity after merger except a desire to curtail jury trial, one of the results the architects of merger did not

240. Id. at 212.
241. There may be further justification for interpreting the jury trial provision of the California Constitution more liberally than the Supreme Court has done with the United States Constitution. The jury trial provision has survived several amendments of the California Constitution, see Cal. Const. art. 1, § 3 (1850); Cal. Const. art. 1, § 7 (1879); Cal. Const. art. 1, § 7 (1928); Cal. Const. art. 1, § 16 (1974), evidence of an intent that a broad exercise of the right remain. In contrast, there have been no changes to the United States Constitution which affect the right to jury trial embodied in the seventh amendment. Therefore, policy considerations, such as the advisability of the jury, are more likely to be expressed in the federal area through interpretation of the seventh amendment rather than by changes to the Constitution. On the state level the fact that the right to jury trial has survived several amendments shows that there is no great barrier to change, so if there is to be a significant reduction in the use of jury trial most likely it would be accomplished by constitutional amendment rather than by interpretation.
243. 23 Cal. 3d at 14, 587 P.2d at 1143, 151 Cal. Rptr. at 330.
244. See note 178 & accompanying text supra.
intend to have their reformed procedure bring about.\textsuperscript{245}

The \textit{C \& K} test is grounded on the historically questionable postulate that it is possible to isolate specific equitable principles with reasonable certainty, an attempt which Justice Newman terms "uninstructive fictionalizing"\textsuperscript{246} and which elsewhere has been called a revival of the "deadwood of the past."\textsuperscript{247} The problem with this test is not solely historical. Due to the lack of any firm criteria the courts will have considerable discretion to decide what these equitable principles are, with the inevitable result of an uneven application of the right to trial by jury. The advisability of jury trial itself is a subject of great controversy among judges;\textsuperscript{248} a test which leaves so much to judicial construction might subject this constitutional guarantee to subtle ideological attack.

A test based on the relief sought would obviate these dangers and uncertainties. It would relieve judges of what they consider to be one of their most perplexing tasks,\textsuperscript{249} and would relieve litigants of the need to plead legal theories, one of the evils sought to be eliminated by modern procedure.\textsuperscript{250} As the law becomes more sophisticated the problem of applying the frequently ephemeral principles developed before 1850 will only be compounded. A remedy test emphasizes practical rather than theoretical concerns because it looks to the purpose of the suit and the remedy which the jury is capable of determining.

These practical goals would be superfluous if they distorted the historical underpinnings of the constitutional provision, but the very virtue of the remedy test is that it combines an historical with a contemporary interpretation of the law-equity division.\textsuperscript{251} As previously noted, the jurisdictional line at common law was primarily a matter of

\textsuperscript{245} James, supra note 172, at 677.

\textsuperscript{246} 23 Cal. 3d at 14, 587 P.2d at 1143, 151 Cal. Rptr. at 330.

\textsuperscript{247} James, supra note 172, at 664.


\textsuperscript{249} See, e.g., Dils v. Delira Corp., 145 Cal. App. 2d 124, 302 P.2d 397 (1956), where the court concluded that "[d]etermining whether an action is legal or equitable may be a fairly sized task under ordinary circumstances, but the problem is multiplied when the relief sought is a sui generis declaration in which event the court is deprived of the advantage of considering the prayer as an indication of whether or not the claim is addressed to equity." Id. at 130, 302 P.2d at 400-01.


\textsuperscript{251} Blackstone's description of the law-equity division indicates why a remedy test is also an historical test. Blackstone declared that the two forms are governed by a "parity of law and reason," explaining: "If [the distinction] principally consists in the different modes of administering justice in each; in the mode of proof, the mode of trial, and the mode of relief."
the remedy. The early code provisions provided for jury trial in actions for the recovery of money only, or for real or personal property; such provisions were meant to be merely declaratory of the existing common law.252 This approach is further buttressed by the holding of the United States Supreme Court in Dairy Queen, Inc. v. Wood253 that "insofar as the complaint requests a money judgment it presents a claim which is unquestionably legal."254 The decision, although not binding on state decisions on the right to jury trial, nonetheless is instructive as a reflection of historical definitions of law and equity.

A remedy test respects history because it examines history to discover the distinctions between law and equity that were most significant in 1850 and that remain meaningful today. The English system developed the concept of equity as an instrument for mitigating the inadequacies of the legal system.255 Thus it can hardly be considered an abuse of the constitutional purpose to define equity now in terms of the present inadequacies of the law—which in effect is what a remedy test does—rather than as an immutable system having jurisdiction over certain issues regardless of subsequent changes in law. This redefinition is not easily made in certain contexts, such as determining when issues should be separately identified. But evaluation of a single claim for damages substantially simplifies application of the test.

The remedy test will cause an expansion of the right to trial by jury, but in a manner consistent with the California Constitution. The test should be elastic enough to account for the changes that were occurring in the period to which the constitution refers.256 Presumably, the framers of the state constitution were aware of the improvements in the law of England; their strong pro-jury bias, exemplified by the constitutional provision, and their failure to limit the provision to specific cases demonstrate approval of these marked historical tendencies toward expansion of the right. Improvement and expansion of law is consistent with one of its normative goals, which is to eliminate the need for an independent equity doctrine that must compensate for the law's deficiencies.257

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2 W. Blackstone, Commentaries *436 (emphasis in original). The different mode of relief is the only one of these differences still remaining.
252. James, supra note 172, at 667.
254. Id. at 476.
255. See notes 169-76 & accompanying text supra.
256. James, supra note 172, at 664. The test of what constitutes law also should reflect the pragmatic approach which has been taken to other concepts in modern civil procedure, such as in personam jurisdiction. See Kane, Civil Jury Trial: The Case for Reasoned Iconoclasm, 28 Hastings L.J. 1, 33 (1976) [hereinafter cited as Kane].
257. See Newman, The Place and Function of Pure Equity in the Structure of Law, 16 Hastings L.J. 401, 422 (1965). "Law and equity are in continual progression, and the for-
should be effectuated whenever the plaintiff seeks damages. The right also might be extended in other ways, such as by separately identifying issues and by resolving order of trial problems in favor of jury trial; however, equity will remain because modern society has real need for the specific remedies it provides.

Exception to the Remedy Test

The limited capabilities of the jury occasionally will make it necessary to except cases from the remedy test. The issue of jury competence pertains to the ability of the jury to decide issues of fact in complex cases. A recent line of United States Supreme Court opinions that reinterpreted the right to trial by jury has provoked a spirited debate on this issue. The Court enlivened the controversy in Ross v. Bernhard when in dictum it stated that the practical abilities and limits of the jury is one factor to be considered in determining the legal or equitable nature of an issue. Recent federal cases have applied this criterion to grant or deny jury trials.

Historically, the competence of the jury occasionally was a factor that influenced the chancellor’s decision to assume jurisdiction of a case. The limited capability of the jury is one reason why requests for equitable remedies are tried by the court. More generally, the right to a jury trial is associated with the concept of a fair trial; if a jury is not competent to decide the issues this historical justification dissolves. A test based on jury competence therefore is historically grounded and appealing in light of the complexity of certain contemporary litigation, but it is fraught with problems of its own.

In evaluating jury competence, the chancellor was dealing with an
agrarian society in which illiteracy was widespread, so it made sense to exclude the jury from certain classes of cases, such as accountings and cases turning on the meaning of written instruments. Exclusion of the jury from entire classes of cases now is inappropriate because jury illiteracy is rare. For example, the jury has been relied upon as a competent fact finder in cases of accounting and in certain corporate claims. The usual problem today is not whether the jury is illiterate but whether it is sophisticated enough to deal with complex cases, a highly speculative issue. A test based on jury competence therefore would have to be applied subjectively on a case-by-case, or even an issue-by-issue, basis. This could grant the judge more power to determine the right to trial by jury than is contemplated by the state constitution, given the rule that the judge may exercise discretion to take a case from the jury only under the rubric of procedural devices that go not to the substance of the right but to its particular incidents.

C & K exhibits the pitfalls that may ensue when a judge makes substantive evaluations of the jury. In addition to its conclusion that discretionary remedies are historically equitable, the court also assumed that because the jury would have to exercise discretion it was not competent to decide the issues. The jury may be competent even where it uses discretion; it is an oversimplification to regard jury discretion and jury competence as synonymous. In tort law the jury is granted “wide” and “elastic” discretion; it compares the fault of plaintiff and defendant and has sole discretion to award punitive damages. In tort actions at common law the assessment of damages was thought to within the exclusive province of the jury.

266. The Right to a Nonjury Trial, supra note 171, at 1181.  
267. See James, supra note 172, at 663.  
268. See note 208 & accompanying text supra.  
271. The court relegates promissory estoppel to equity primarily because the doctrine “necessarily call[s] into play discretionary powers.” 23 Cal. 3d at 7, 587 P.2d at 1139, 151 Cal. Rptr. at 326.  
274. See Brewer v. Second Baptist Church, 32 Cal. 2d 791, 801, 197 P.2d 713, 719 (1948);  
The problem of jury competence is real; it should not, however, be dealt with by restrictive interpretations of the state constitution that actually are misleading, covert attacks on the jury. The question should be debated openly; it is a politically sensitive issue for the judge, and encroachment on the jury trial is unwise without an adequate measurement of jury incompetence.276

Why Trial by Jury is Preferable for Promissory Estoppel Actions

Although restraints on the civil jury may be advisable due to incompetence, promissory estoppel actions are not likely to be a cause for such restraints. The issues generally concern questions of credibility, which are especially proper for jury determination. The legal theories are not complex and in fact a promissory estoppel action is probably more suited for a jury than a contract action because reasonable reliance can be more easily understood than mutuality of obligation.

Fundamental to a promissory estoppel action is the reasonable person standard; it would be difficult to find a more appropriate issue for jury determination. From the promisor's perspective, the issue is whether a reasonable person should have foreseen reliance; from the promisee's perspective, the issue is whether it was reasonable to rely. The trial court's use of an advisory jury in C & K underscores the need for a jury in this action. The issue of damages is within the province of the jury because they will be awarded either on a reliance or expectation basis, as in contract actions. Moreover, even when an equitable remedy is sought the jury can determine liability. As a result of the issues involved the virtues which traditionally have been ascribed to the jury would be manifested in promissory estoppel actions.277

The strong statutory preference for trial by jury whenever money is claimed as due upon a contract278 should prompt the courts to inter-

276. A few studies of jury effectiveness have been attempted, but the results generally were inconclusive. See Kane, supra note 256, at 31-33. One solution might be for California to provide a master to assist in complex cases, as the federal rules provide. Fed. R. Civ. P. 53(b). See also Dairy Queen, Inc. v. Wood, 369 U.S. 469, 478 (1962). For suggestions on upgrading jury deliberations see Note, The Right to a Jury Trial in Complex Civil Litigation, 92 Harv. L. Rev. 898, 915-16 (1979). The problem of delay, however, is best dealt with in other ways, such as arbitration procedures for small civil disputes. See Cal. Civ. Proc. Code §§ 1141.10-32 (West Supp. 1979).

277. The claim has been made that juries bring common sense to the law and mitigate harsh laws and precedents, in which case promissory estoppel may be particularly appropriate for a common sense jury decision. See 1 Holdsworth, supra note 169, at 348-50; Redish, supra note 167, at 507. Judge Jerome Frank found many justifications for trial by jury: (1) jurors are better fact finders than judges; (2) jurors neutralize unjust laws; (3) jurors protect the public from incompetent judges; (4) jury duty educates the public; and (5) the jury is a medium for popular participation in government. Frank, supra note 234, at 127-37.

278. See note 6 supra.
pret the concept of contract liberally so that rights will not be abridged. Promissory estoppel should be included within the province of the jury as a matter of fairness and convenience because plaintiffs often will plead promissory estoppel and contract in the alternative. If promissory estoppel is deemed equitable then the court could try that claim first and thereby dispose of the contract claim by collateral estoppel or res judicata; in the alternative the court could label the entire case essentially equitable and try it without a jury.

**Conclusion**

There is persuasive authority for allowing a jury trial in a promissory estoppel action when damages are sought. The policy of the California courts is to grant a demand for jury trial in all actions where damages are requested, whether or not the action involves equitable principles. The compelling circumstances that should be required to create an exception to this policy, such as historical association with equity or complexity of the issues, simply do not exist in promissory estoppel actions. On the contrary, the contract principles drawn from several eras which have been aggregated to create promissory estoppel demand that it be treated as a contract for all purposes.

The absence of bargained-for consideration does not undermine this conclusion. Since the sixteenth century, bargained-for consideration has been sufficient to form a contract, but it has never been absolutely necessary. The law of contract is not inextricably linked to a particular paradigm of consideration because each era has defined consideration in its own terms. An aspiration of modern contract law surely is to promote fairness and the reasonable expectations of the parties; its flexible use of the consideration requirement in pursuit of this goal emphasizes that there is both a place and a need for promissory estoppel in contract. Courts, commentators, and the Restatement of Contracts have already acknowledged promissory estoppel's accession to contract status. The California Supreme Court should not subvert this welcome development by denying jury trial in these actions.

The manner in which the court analyzed the right to trial by jury in *C & K* is as suspect as the particular result it achieved. It has been seen that even under the test invoked by the court a jury trial should be granted in a promissory estoppel action because this action depends upon basic contract principles to make a promise enforceable. Aside from the court's assessment of promissory estoppel, it has also been

279. A nonrestrictive interpretation was suggested by the California Supreme Court when it said that a cause of action arising from a breach of promise is contractual. L.B. Laboratories v. Mitchell, 39 Cal. 2d 56, 62, 244 P.2d 385, 388 (1952). See note 33 & accompanying text *supra*. 
seen that a jury trial test predicated on the principles which support an action rather than the remedy sought does justice neither to history, modern procedure, or the state constitution. Equitable principles were so freely applied at law by 1850 that even then equity could be distinguished by little more than its specific remedies. This process is so close to completion under merger that the court would have been well-advised to adopt Justice Newman's proposal that whenever damages are sought a jury trial should be a matter of right. In a single stroke this test avoids the constitutional problems which, in light of history, will always arise when a jury trial is denied if damages are requested and spares the court the problematic task of having to decipher equitable principles. If equity jurisdiction is retained for complex cases it should be done cautiously, because a jury trial test based on jury competence requires a thorough reassessment of the civil jury.