March 20-21, 1958

Memorandum No. 2

Subject: Single Action for Rescission of Contract

Attached are the following:

1. Excerpts from the minutes of the meetings of the Northern Committee of July 26 and September 19, 1957 and January 18, 1958 relating to this study.

2. The research study on this subject prepared by Professor Lawrence A. Sullivan of Boalt Hall (now in practice in Boston).

3. My proposals for certain changes in the statutes proposed by Professor Sullivan.

4. Copy of a letter from Professor Sullivan.

As these materials will indicate the Northern Committee got into an impasse in considering this subject (see, in particular, minutes of September 19, 1957) due to the fact that the Committee consisted of only two members for a time. It was hoped that this impasse would be resolved at the meeting of January 18, 1958, but this did not come about since Mr. Levit was unable to attend the meeting. It was then decided that the matter should be brought before the full Commission. Mr. Sullivan's letter relates to the impasse.

This matter will be on the agenda of the March meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

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STUDY NO. 23 - RESCISSION OF CONTRACTS

The Committee began but did not have time to complete its consideration of Professor Sullivan's study.

The Committee tentatively agreed to recommend to the Commission that it recommend (1) that a single rescission action be established; (2) that a right to jury trial be provided; (3) that attachment be made available and (4) that such an action be joinable with unrelated contract actions.

The Committee was unable to agree whether the new procedure should include a requirement that the person desiring to rescind promptly give notice thereof and offer to restore what he has received. Mr. Stanton favors such a requirement; Mr. Thurman would make failure to give notice and offer to restore a defense only when the other party has been prejudiced thereby.

No decision was reached with respect to what statute of limitations should apply to the single rescission action or as to whether the justice court should be given jurisdiction of rescission actions.

The statute proposed by Professor Sullivan was not discussed in detail.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

STUDY NO. 23 - RESCISSION OF CONTRACTS

The Committee gave further consideration to Professor Sullivan's study. The Committee discussed again whether a new single rescission action should include a requirement that the person desiring to rescind give prompt notice thereof to the other party and offer to restore what he has received.

In the course of this discussion Mr. Stanton stated that he has great doubt about the wisdom of Professor Sullivan's recommendation that the present provision in California law for out-of-court rescission be abolished. He stated that, in his opinion, the law should continue to make it possible for a party desiring to rescind a contract to do so without having to go to court to obtain a decree of rescission in the event that the other party is not willing to engage in a mutual rescission of the contract. He stated that parties act at the present time on the assumption that a unilateral out-of-court rescission does terminate a contract and that it is undesirable to create a situation in which a party must bring a lawsuit to rescind a contract. Mr. Stanton suggested that the law should either continue to provide for out-of-court rescission as an alternative to bringing suit to obtain a rescission or that, if there is to be but a single action, it should be an action to enforce an out-of-court rescission rather than an action to obtain a decree of rescission. He stated that as he sees the matter it is one of

eliminating the problems arising out of the duality of the existing legal and equitable actions and that this could be done under either of the alternatives which he suggested just as readily as by providing a single action to obtain a decree of rescission.

Messrs. Thurman and McDonough questioned whether there is any need to retain the out-of-court rescission, other than in the form of a mutual rescission by the parties. They took the following position:

> A "unilateral out-of-court rescission" is legally meaningless and will not preclude litigation except in the rare case where the other party is willing to acquiesce in the "rescinding" party's desires even though unwilling to state his acquiescence and thus effect a mutual rescission. A law suit is always necessary when the person seeking rescission desires to get back from the other party benefits conferred under the contract. A suit is also necessary even where no recovery is sought against the other party if the person desiring to rescind wishes to have his legal rights in the matter clearly settled. If the other party announces his disagreement with the rescinding party's assertion of his right to rescind, the rescinding party is exposed to the possibility of a suit for a breach of contract until the statute of limitations has run despite the fact that he has announced that he has rescinded the contract. If such a suit is brought, the defense will be those acts of the plaintiff which were the <u>grounds</u> for the "unilateral

out-of-court rescission"; nothing is added to this defense by virtue of the fact that the defendant undertook to effect an "out-of-court rescission". Even if "out-of-court rescission" is recognized, a rescinding party must, to avoid the over-hanging risk of a breach of contract action, bring an action to obtain rescission (if this is available as an alternative remedy) or bring a declaratory judgment action to put an end to his potential liability under the contract. In either case, the plaintiff's rights will depend, not on the fact that he has purportedly effected an "unilateral out-of-court rescission", but upon whether grounds for rescission of the contract in fact existed when he acted. Thus, the "out-of-court rescission" is legally meaningless and need not be retained as a part of our law.

Messrs. Thurman and McDonough were, therefore, of the opinion that Professor Sullivan's recommendation to abolish out-of-court rescission and have a single action to obtain a decree of rescission is the sound approach to ending the existing duality in rescission procedure.

It was decided that all concerned would give the matter further consideration and that the Executive Secretary should attempt to draft statutory provisions embodying both of the alternatives suggested by Mr. Stanton in order to see whether it would be feasible to enact either or both of them if the Commission were to decide upon them.

The study was continued on the agenda of the Committee for further consideration at its next meeting.

Respectfully submitted,

John R. McDonough, Jr.
Executive Secretary

Minutes of Special Meeting
San Francisco - Jan. 18,1958

STUDY NO. 23 - RESCISSION OF CONTRACTS

The Commission had before it the research study prepared by Professor Lawrence A. Sullivan; Memorandum No. 4 relating to this study (a copy of which is attached to these minutes); copies of the portion of the minutes of meetings of the Northern Committee held on May 4, July 26, and September 19, 1957, relating to this study (copies of which are attached to these minutes); and a copy of a letter received from Professor Sullivan commenting on the matter discussed in the minutes of the meeting of September 19. After the matter was discussed it was agreed that since Mr. Levit was not present and since the impasse of September 19 had not been resolved this study should be submitted to the Commission at a regular meeting without further consideration at another special meeting.

February 12, 1958

A STUDY TO DETERMINE WHETHER THE CIVIL CODE SHOULD BE AMENDED SO AS TO PROVIDE FOR A SINGLE METHOD OF PROCURING A RESCISSION OF A CONTRACT.

This study was made at the direction of the Law Revision Commission by Acting Associate Professor Lawrence A. Sullivan of the School of Law, University of California, Berkley, California.

The California Civil Code comprehends two types of action for rescissionary relief--an action to procure the benefits of an out of court rescission (hereinafter called "action to enforce a rescission") and an action for a decree of rescission (hereinafter called "action to obtain a rescission"). Many questions both of substance and of procedure which frequently arise in rescission litigation have been made to turn upon whether a particular action is classified as one to enforce an out-of-court rescission or one to obtain a decree of rescission. The purpose of this study is to determine what lies at the basis of the existing duality and to inquire whether there are reasons of policy which justify the distinctions which prevail.

To achieve this end it will be necessary, first, briefly to describe the two procedures; second, to summarize their history; and, third, to analyze the substantive and procedural distinctions which are presently drawn for the purpose of determining which of them might wisely be abandoned. After this has been done recommendations will be made respecting such legislative changes as seem to be indicated.

I. The Dual Rescission Procedures Presently Prevailing in California.

In California the right of an aggrieved party to bring an action to enforce a rescission is inferred from Sections 1688 to 1691 of the Civil Code. The principal sections are 1689 and 1691. The former lists the grounds for an "out of court" rescission. These include matters, such as fraud, vitiating the original contractual consent, certain situations where consideration has failed, and cases where the parties have agreed to rescind.[1]

The latter section provides, in substance, that where one of these grounds exists, an aggrieved party may rescind by promptly offering to restore to the other party everything of value received by him under the contract upon condition that the other party do likewise.

The code does not explicitly vest the aggrieved party with a cause of action to enforce the out-of-court rescission, but the courts have recognized that he will frequently require judicial intervention to enforce the right to rescind which is provided by the code. Of course if the party against whom rescission is sought accepts the offer of restoration and returns what he has received, the status quo ante is re-established, each party regaining both possession of and title to the things with which he had parted, all liabilities under the contract being discharged. But if the offer of restoration is refused, litigation will be necessary. It is settled, accordingly, that where the rescinding party has paid money to the other under the contract, he acquires, upon an out-of-court rescission, a cause of action for the sum paid.[2] Similarly, if the rescinding party has conveyed a chattel to the other party, he may sue for its value,[3] or, at least in certain situations, for its specific return.[4] Where real estate has been transferred, the rescinding party may procure specific restitution in an action of ejectment[5] or, where the other party has transferred the realty to a bona fide purchaser, the rescinding party may recover its value in a quasi-contractual action.[6]

The action to obtain a rescission is authorized by Sections 3406 to 3408 of the Civil Code. The principal section is 3406, which states that rescission may be adjudged for any of the grounds which, pursuant to 1689, would provide a basis for an out-of-court rescission or, in addition, in certain cases where the contract is unlawful or against public policy.

Actions to obtain a rescission have been denominated "equitable" by the courts, in contrast to actions to enforce an out-of-court rescission, which are called "legal."[7] Again, while the code sections are not explicit, it is obviously contemplated that the court will effectuate its decree of rescission by such ancillary decree or judgment as may be necessary, and this has been the consistent practice. For instance, in decreeing a rescission the court may also enter a judgment for the value of the consideration received by the party against whom rescission is obtained,[8] may decree the cancellation of a document,[9] or may establish a constructive trust.[10]

II. The Historical Background for Dual Rescission Procedures.

A - The Common Law and Equity Traditions

It should be emphasized at the outset that the bifurcated rescission procedure is not peculiar to California. The distinction between an action to obtain and an action to enforce a rescission is rooted in early common law and chancery cases and prevails generally in jurisdictions having an English law heritage. The distinction derived initially from conceptions concerning the differences between the inherent powers of common law courts and courts of equity. The development can be illustrated most vividly with reference to rescission as a remedy where the original contractual consent of one of the parties was defective.[11]

Fraud, duress, mistake, and the like, prior to the development and expansion of the action of general assumpsit during the 17th and 18th centuries, were not, in the common law courts, bases for setting aside otherwise enforceable contractual commitments (i.e., contracts under seal),

either by way of defense to actions predicated upon such contracts or in support of actions to procure the return of consideration paid under such contracts.[12] The courts of equity, by contrast, afforded relief in the nature of rescission for fraud, duress and mistake from the very earliest period.[13] Equitable proceedings for rescission were, of course, governed by the standards which applied generally in equity. The basis for equitable jurisdiction was the lack of an adequate remedy at law. Similarly, petitioner, to procure relief, was required to offer to do equity by returning anything of value received by him and was subject to being defeated by all of the usual defenses in equity, such as laches. The decree, moreover, in accordance with the equity tradition, could be conditional; if the petitioner had received anything of value under the agreement, the respondent could be ordered to convey back what he had received only upon condition that the petitioner returned what he had received.[14]

Ultimately, in line with the overall expansion of legal remedies during the 17th and 18th centuries, the common law courts came to allow restitutionary relief respecting contracts procured by fraud, duress, mistake and related impositions. The common law courts never asserted a general power to act in personam. They regarded themselves as incompetent to enter decrees, like those entered by equity courts, terminating contracts. They could, however, and did, in the action of assumpsit, enter a judgment against a defendant for the value of any consideration he had received.[15] The earliest case allowing such restitutionary relief in assumpsit where consideration had been paid on a contract induced by fraud seem to have been decided in the last decade of the 17th century,[16] although there were earlier decisions allowing recovery in assumpsit where money had been paid under a mistake.[17]

It is interesting to note that these early common law opinions upholding restitutionary relief did not adopt the vocabulary of equity to the extent of saying that the contracts had been rescinded out-of-court by the parties. Rather, the courts either ignored the doctrinal dilemma that was posed by the fact that relief was being granted in the face of a subsisting contract or else referred to the contract as having been void at its inception due to the defect in consent.

It was not long, however, before the term "rescission," which had developed in equity, came to be used by the common law courts. But since these courts felt themselves incapable of decreeing rescission, they adopted the expedient of referring to the contract as having been rescinded by election of the plaintiff before the commencement of the action. This theory, in lieu of the one that the contracts were void ab initio, was essential to logical consistence, for it was clear that such contracts were not wholly void. A plaintiff whose consent had been procured by fraud could, if he chose, affirm the contract. And restitutionary relief was not available if the rights of innocent third parties had intervened.

Just when the courts of law began to speak in terms of an out-of-court rescission is not entirely clear. Cases are to be found in the United States even as late as the middle of the 19th century in which courts, in allowing restitutionary relief in actions at law, refer to contracts procured by fraud as being "void."[18] Yet the concept of an out-of-court rescission by the plaintiff as laying the basis for a restitutionary action at law seems to have been reasonably well established by the end of the 18th century.[19] The pertinent matter, for present purposes, is to emphasize that the notion of an out-of-court rescission as a condition to an action

at law for restitutionary relief was, in essence, a theoretical mechanism which, in view of the felt lack of power in the law courts to decree rescission or enter conditional judgments, seemed essential if a foundation was to be provided for the restitutionary relief granted. By granting unqualified judgments requiring the defendant to return what he had received, but only upon a showing that the plaintiff had already returned or tendered back what he had received, upon the theory that the plaintiff had himself perfected his right by rescinding the agreement without judicial intervention, common law courts were able to achieve substantially the same result which was achieved in equity.

B - The Background of the California Code Provisions Respecting Rescission

There is surprisingly little that needs to be said respecting the legislative history of the sections of the Civil Code dealing with rescission. The present provisions date from the 1872 legislation and were taken directly from the Field Draft Code of 1865. Unquestionably, the objective of this draft was to codify the principles which were at that time being administered in courts of common law and equity in American jurisdictions.[20] And, as is true with respect to the Field Draft generally, there was no attempt to particularize beyond stating the governing general principles.

Since 1872, the rescission provisions have been amended only twice. In 1931, a change was made in Section 1689 intended to conform the provisions respecting grounds for an out-of-court rescission to those incorporated in the Uniform Sales Act which was adopted in California in that year.[21] And in 1953 Section 3406 was amended to make illegality a ground for rescinding oral as well as written contracts and to clarify certain other provisions.[22]

The effort to mirror the judge-made law in the code failed in certain particulars. For instance, Section 3406(1), by incorporating en toto as grounds for an action to obtain a rescission the grounds which Section 1689 establishes for an out-of-court rescission, authorizes actions to obtain rescission for breach of contract, although this ground would not support an equitable action, except in unique instances, under an uncodified jurisprudence. Similarly, in specifying illegality as a ground only for an action to obtain a rescission and not as a ground for an out-of-court rescission, the code seems to reject the tradition whereby common law courts allowed restitutionary relief in certain cases of illegality which antedates the comparable equity tradition.[23] Yet, by and large the code enacts the judge-made law which prevailed when it was drafted. The existing provisions, therefore, cannot be viewed as providing legislative standards deliberately fashioned with a view to the needs of a merged procedure; on the contrary, they embody conceptions as to the nature of rescission which grew out of the needs of the common law courts to fashion, within the limits of their traditional powers, remedies which were comparable to those available in equity.

III. Substantive and Procedural Distinctions between Actions to Obtain and Actions to Enforce a Rescission

Under present law a variety of important questions both of substance and procedure in litigation respecting rescission may be resolved by determining whether the action is to be denominated one to obtain a rescission or one to enforce a rescission. In this section of this study these distinctions will be reviewed with the purpose of evaluating whether they are warranted by considerations of policy or are merely vestiges of the historical distinctions which once prevailed between actions at law and proceedings in equity.

A - The Right to Jury Trial

Perhaps the most significant issue in rescission litigation which may turn upon whether an action is classified as one to enforce or one to obtain a rescission is whether there is a right to jury trial.[24] It is settled learning that merger of law and equity does not diminish the constitutional right. The cases teach that whether jury trial is available depends upon whether the action is one which, historically, would be cognizable at law rather than in equity and that this, in turn, depends largely, if not exclusively, upon the nature of the relief which is sought.[25] If the remedy can be likened to historic equitable remedies, jury trial is not available. If it is more readily analogous to a historic legal remedy, the right to jury trial prevails.

The difficulty of discriminating on this basis is often intense. It is particularly so in proceedings involving rescission. The action to obtain a rescission is inherited from an equity tradition. Involving, as it does, a judicial decree of rescission, it entails a remedy essentially equitable in character. Accordingly, it is tried without a jury.[26] The action to enforce a rescission, by contrast, derives from common law antecedents and entails remedies of a legal character. In this action, therefore, a jury is available.[27] Thus, in circumstances where a rescinding party may proceed by way of an out-of-court rescission and an enforcement action, he may always procure a jury, if he chooses and, similarly, in circumstances where he may proceed by way of an action to obtain a rescission, he may always preclude trial by jury, if he chooses.

The difficulties in this sphere revolve around the problem of determining the circumstances under which the alternative actions may be elected. It is clear, on the one hand, that a rescinding party who requires

not only rescission and a money judgment but also ancillary equitable relief in order to be fully protected has the right to proceed by way of an action to obtain a rescission (thus foreclosing jury trial).[28] It is clear, on the other hand, that where the only ultimate relief sought is a money judgment, the plaintiff has the right to proceed by way of an out-of-court rescission and an enforcement action (thus securing jury trial).[29] More problematical are the converse questions: (1) whether a party seeking, ultimately, only a money judgment (or a comparable legal remedy) may, if he chooses, eschew the legal remedy of an out-of-court rescission and an enforcement action and elect in its stead the equitable remedy of an action to obtain a rescission, thus denying a jury to the other party; and (2) whether a party seeking both a money judgment and ancillary equitable relief may, if he chooses, reject the equitable proceeding of an action to obtain a rescission and proceed by way of an out-of-court rescission and a legal enforcement action coupled with prayers for ancillary equitable relief, thus procuring a jury although equitable relief is essential.

If Section 3406 of the Code is read without the gloss of generally prevailing conceptions about conditions for equitable relief, the conclusion would be reached that the action to obtain a rescission is unqualifiedly available where grounds for rescission exists, and hence that a rescinding party may always foreclose the opportunity for jury trial. Nothing in the statutory language expressly suggests that the action to obtain a rescission is to be withheld if the action to enforce a rescission would afford complete justice. There are, moreover, a few cases which must be regarded as holding, at least by implication, that a party may elect to proceed by way of an action to obtain a rescission even

though he seeks no ultimate relief which could not be obtained in an action
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to enforce a rescission. Fairbairn v. Eaton is an example. There, the plaintiff had been induced by fraud to purchase from the defendant an assignment of a specified percentage of all royalties which might accrue to the defendant under an oil lease. Plaintiff had paid a total of $1,250 to the defendant and received a written assignment. On learning of the fraud, the plaintiff offered to rescind, requesting a return of his purchase money. When the defendants refused this offer the plaintiff brought an action in the superior court praying that the court adjudge a rescission, cancel the written assignment held by plaintiff and enter judgment against the defendant for the purchase money plus interest. On an appeal from a judgment for the plaintiff, the court held that the action was one to obtain, rather than to enforce a rescission, inasmuch as plaintiff had prayed for a decree of rescission and a cancellation of the assignment held by him and hence was an equitable action which, under the then governing jurisdictional provisions, was within the jurisdiction of the superior court. Inasmuch as the ultimate relief needed was merely a return of purchase money, the prayer for the cancellation of the written assignment was largely superfluous. This instrument affording the defendant no rights against the plaintiff, and, in any event, was in the plaintiff's own hands. But the court was undisturbed by the fact that an out-of-court rescission and an enforcement action at law would have been adequate. Indeed, the question whether the equitable remedy was foreclosed was not even directly discussed.

Fairbairn, it must be noted, did not specifically focus on whether the defendant could demand a jury. But by classifying the action as equitable for jurisdictional purposes the court must be taken to have

resolved this question as well. There is, moreover, an earlier supreme court case in which, the plaintiff having proceeded by way of an action to obtain rescission, a jury was held to be unavailable although on the facts alleged an out-of-court rescission and an action at law for enforcement would have adequately suited the plaintiff's objectives.[31] In view of these cases and the unqualified language of the code provisions, commentators have assumed without question that a plaintiff may elect at his pleasure either an equitable action to obtain a rescission or a legal action to enforce one.[32] And this, very likely, is the law.

It is at least conceivable, nonetheless, that the supreme court would hold, should this issue be squarely and articulately presented to it, that a plaintiff may not deprive the defendant of a jury trial by couching his claim as one to obtain a rescission (i.e., as an equitable action) where an out-of-court rescission coupled with an enforcement action (i.e., a legal action) would assure complete relief. It is settled in most jurisdictions that a rescinding party does not have alternative procedures unrestrictedly available.[33] If his ultimate objective is merely a money judgment or similar relief of a legal character, the equitable proceeding to obtain a rescission will be unavailable. And it is the general rule in California, as elsewhere, that equitable remedies are not available where legal remedies are adequate. Thus, with respect to problems closely related to rescission the courts of California have held that a plaintiff may not deprive a defendant of the right to jury trial merely by couching his claim in terms of remedial doctrines peculiar to equity.[34] Moreover, the great bulk of the cases in which use of the action to obtain a rescission has been approved are cases in which complete relief necessitated the intervention of a court of equity for the purpose of providing

ancillary remedies.[35] Accordingly, the California court might reject the implications of earlier decisions and hold that a rescinding party must rely on his legal remedy where this is adequate.

If it be assumed, however, as presumably it may be, that the existing code provisions do give to the plaintiff an unencumbered option to proceed in equity, the rescinding party is being afforded an election with respect to jury trial which would be denied to him under a pristine system of separate law and equity procedures. The constitutional ideal -- that jury trial be available in all cases where it would be available historically -- is failing of achievement, insofar as rescinding parties are permitted to proceed in equity, thus foreclosing jury trial, despite the fact that the alternative legal remedy under which the defendant would be assured a jury trial is adequate.

There is also an indication in past decisions that a rescinding party may, if he chooses, proceed by way of an out-of-court rescission and an enforcement action at law even though he requires ancillary remedies of an equitable character, such as cancellation of an instrument. Thus, the rescinding party seemingly has an unqualified opportunity to insist on a jury trial as well as to foreclose the possibility for one. The leading case is McCall v. Superior Court[36] where the court held that the provisional remedy of attachment (which is available in support of certain quasi-contractual claims) might be had by a party who had completed an out-of-court rescission and was suing for money damages even though he sought the ancillary equitable remedy of cancellation. The fact that ancillary equitable remedies were sought was not regarded as making the legal action to enforce a rescission unavailable. Concededly, the precise question before the court was not the availability of a jury trial where ancillary

equitable remedies are prayed for. Yet the rationale of the holding seems comprehensive enough to resolve this question. Once again, therefore, the rescinding party seems to be afforded an election with respect to jury trial which he would not have under a non-merged system wherein, to procure ancillary equitable relief, he would be obliged to proceed in equity, thus foregoing a jury trial.

The provision of a single rescission procedure in lieu of the existing dual procedures would facilitate a resolution of existing confusion as to the availability of jury trial. It would also facilitate a termination of the advantage -- unfair on the face of it and unsupported by the common law history incorporated in the constitutional provision respecting jury trial -- which a rescinding party seems presently to possess in being able to elect at his pleasure whether to proceed by way of an action to enforce a rescission in which a jury may be had or by way of an action to obtain a rescission which must be tried to the court. Such a unitary procedure would, of course, include among others claims such as those for money damages only, which, historically, could be brought at law. Thus it would not be constitutionally permissible (even if it were deemed desirable) to do away with jury trial entirely. The appropriate solution, therefore, would seem to be to provide for jury trial in all rescission cases.

This solution would put an end to the prevailing practice of discriminating between jury and non-jury cases in terms of procedural distinctions which are totally irrelevant substantively and to the privileged position which the rescinding party seems now to possess. It would also resolve the pervasive uncertainty as to the availability of jury trial in rescission cases which currently plague both the bar and the courts. And, unlike the alternative of doing away with jury trial entirely, it would entail no constitutional problems.

B - The Requirement of an Offer to Restore Benefits Received Prior to the Initiation of an Action Respecting Rescission

Another vital issue which may turn upon whether an action is denominated one to obtain a rescission or one to enforce a rescission is whether notice of rescission and an offer by plaintiff to restore the consideration received by him under the contract is a condition precedent to the action. Historically, actions to enforce a rescission could be brought, with certain exceptions, only if the plaintiff had made a timely tender of restoration before commencing the action.[37] In most jurisdictions this requirement was modified, in time, to one that the plaintiff give timely notice of rescission and make an offer, rather than a technical tender of restoration.[38] It is this modified requirement which is made applicable to actions to enforce a rescission by Section 1691(2) of the Civil Code. On the other hand, most jurisdictions (recognizing that the pre-action tender requirement was developed originally by the law courts only because they could not enter conditional judgments) have not enforced such a condition to relief in equitable actions to obtain a rescission; they have merely required an offer to do equity in the bill and have sometimes dispensed even with this condition as a mere matter of form.[39] And despite a number of older California decisions in which no distinction as respects this matter is drawn between actions to enforce and actions to obtain a rescission,[40] it seems now to be settled in this State as it is elsewhere that a pre-action notice of rescission and an offer of restoration is not a condition to an action to obtain a rescission.[41]

This distinction between the two types of actions presents a significant hazard for a party who wishes to rescind. He may conclude, although erroneously, that his case falls into one of the many exceptions which the

courts, following the tradition in other jurisdictions, have engrafted upon the statutory requirement of restoration in out-of-court rescission cases.[42] He may have doubts as to precisely what he must restore, as, for instance, where he has had the beneficial use for a period of time of property having an indeterminate use value,[43] even though the transaction may not be so complicated as to meet the judicial standard that a notice and offer are not necessary where an accounting is called for. Or he may erroneously, though in good faith, conclude that the defendant is indebted to him in an amount exceeding the value of that which he has received under the contract, wholly regardless of whether there is a ground for rescission. There is also the danger that the plaintiff, although seeking to comply with the restoration condition, may not make his offer to restore unambiguously or may fail to make it in such a manner as to facilitate proof that it has actually been made.[43a] Yet, if the plaintiff does not make, or if he fails at the trial to prove that he made, an offer to restore, he may, should his pleading be [capable of being] construed as one asserting a claim to enforce an out-of-court rescission, lose his remedy entirely.

Of course dangers of this kind can be avoided by careful lawyering. But as Professor Patterson had noted, restitution claims may involve small sums and may be prosecuted without exquisite care.[44] This being so, it would seem inexpedient to hem the remedy in with subtle procedural distinctions which may trap the unwary and which are not supported by pressing reasons of policy.

There is another anomaly with respect to the restoration requirement which has received scant attention yet which is plainly pertinent to any decision which might be made respecting rescission procedures. It is settled in California, as elsewhere, that upon a total breach of contract

an aggrieved party may elect, as an alternative to rescission, an action for compensatory damages for breach.[45] While compensation is normally computed by calculating the value of the performance the plaintiff was entitled to receive from the defendant less the amount saved to the plaintiff by reason of the breach,[46] it seems equally well settled that the plaintiff may, if he elects, prove his damages by showing the amount of expenditures reasonably made in part performance, so long as these do not exceed the full value of the performance promised by the defendant.[47] Inasmuch as the expenditures in part performance will inevitably include the cost of items furnished to the defendant, this recovery is, in part, almost identical to that which might be recovered on rescission, i.e., the value of items furnished to the defendant. Thus, by casting his complaint as one for compensatory damages rather than rescission, a plaintiff upon a total breach may be able to obtain substantially the same recovery which would be had upon a rescission, but without the necessity for giving notice or making an offer to restore. Indeed, by so proceeding the plaintiff may avoid entirely the necessity for making restoration in specie. In the action for damages, in sharp contrast to that for rescission, the plaintiff is permitted to keep what he has received, an offset for its value being permitted to the defendant.[48]

Should the plaintiff seek specific restitution, in most jurisdictions he would be required to proceed by way of rescission and to meet the conditions respecting rescission.[49] Yet, in Alder v. Drudis[50] the California Supreme Court held that the plaintiff may even procure specific restitution as a substitute for compensatory damages for total breach in an action apparently premised on the theory that the contract was being enforced rather than rescinded. Although the plaintiff had received a substantial

sum under the contract, the court ruled that a judgment for specific restitution might be entered, conditional upon the plaintiff restoring what he had received, despite the fact that there was no showing by the plaintiff of a rescission -- indeed, despite the fact that the plaintiff, before bringing the action, had refused the defendant's offer to rescind.

Damages measured by the cost of plaintiff's performance, it should be noted, are only available as an alternative to rescission where the ground for the relief is a total breach and not where it is one of the other grounds for rescission, such as fraud, mistake or illegality. Thus, only in cases of breach may the injured party procure restitutionary relief in an action at law without meeting the condition of restoration. Yet, it would seem that were a distinction to be drawn respecting the requirement of restoration prior to the action, the less onerous conditions ought to prevail in actions where the wrong sought to be redressed is fraud, duress or undue influence rather than mere breach, which might transpire without the defendant being guilty of any morally reprehensible conduct.

The distinctions which have been drawn with respect to the requirement of restoration both between actions to enforce and actions to obtain a rescission and between actions to rescind and actions to obtain restitutionary damages for total breach, strongly suggesting the need for legislative reform. But should a unitary rescission procedure be determined upon, the question will arise whether or not restoration should be made a condition to the action under the new unified procedure. It is necessary, accordingly, to consider the two justifications which are usually offered for the restoration requirement.

It is frequently asserted that an offer of restoration before trial is essential in actions at law if the defendant is not to be put unnecessarily

to the burden of commencing an action of his own to procure restoration if relief on the theory of rescission is allowed to the plaintiff. This is an accurate generalization only if a court administrating a legal remedy may not grant conditional relief. The problem would vanish in most situations were the court authorized to enter a conditional judgment requiring the defendant to restore what he had received of the plaintiff only upon the concurrent condition that the plaintiff tender to the defendant, within a time specified by the court, whatever the court finds the plaintiff is obliged to restore. Normally, this would assure complete justice to each of the parties and would relieve the plaintiff, the injured party, of determining at his hazard, prior to the action, precisely what was due to the defendant and of making an unambiguous and readily provable offer to return it.[51]

Conditional judgments of the kind here contemplated are entered now as a matter of course in actions to obtain a rescission, as authorized by Section 3408.[52] And while conditional judgments are generally regarded as equitable devices,[53] surely there is no profound reason under a merged procedure why a court proceeding in an action, such as one for a money judgment, having legal rather than equitable antecedents could not be legislatively authorized to enter such a judgment. Courts of law have long exercised authority to make orders for a new trial conditional in appropriate cases[54] and, today, in other jurisdictions, courts of law either with or without specific legislative authorization[55] frequently make[56] judgments in rescission cases conditional. While the California courts have not assumed such a general power, the supreme court has approved the use of the conditional judgment device in one case involving an action in the nature of a proceeding at law to enforce a rescission[57] and the district

court of appeal has approved the use of a conditional order for a new trial as an appropriate means for achieving the same substantive result.[58]

It would seem, therefore, that the most expeditious and equitable solution to the difficulties arising out of the differing requirements as to restoration which are currently applied in the two rescission procedures would be to do away with the requirement of a pre-judgment offer to restore and to specifically authorize courts to make their judgments conditional on restoration, regardless of the nature of the relief sought. Such a solution would in most cases assure justice to each of the parties and would accord with the trend and direction of judicial innovations both in California and elsewhere and with the legislative trend initiated in New York.

There is, however, one situation where a conditional judgment alone would not assure to the defendant a restoration of benefits received by the plaintiff under the agreement. When the plaintiff's primary claim is not for rescission but is premised on an independent substantive ground, such as a tort or a contract, he may seek, ancillarilly, to rescind a release which he had previously given to the defendant. The problem is illustrated by the recent decision in Carruth v. Fritch.[59] There the plaintiff was allowed to maintain an action for damages for injuries received in an automobile accident despite his failure to tender the return of $2,000 which he had received for a release which he alleged had been procured by fraud. The court was of the view that the defendant, under the particular circumstances, must have known that the plaintiff, upon discovering the fraud, would be incapable of making restoration and that this justified excusing the usual requirement.

It would seem clear that the plaintiff in such a situation must make out his claim for rescission on the release before being entitled to have

his underlying claim considered. And if a basis for rescission is established and the plaintiff prevails on his underlying action and is awarded damages in greater amount than the sum received for the release, the court can do complete justice by simply off-setting the amount which the plaintiff received for the avoided release against the judgment rendered, as the court in the Carruth case recognized. Yet, it is obviously possible that the plaintiff will succeed in establishing a basis for rescission of the release -- and hence be revested with his cause of action -- and yet either not prevail upon his underlying claim or else recover damages on it in an amount less than the sum he received for the release. In this posture, the defendant, having been subjected to risks of the law suit which he had paid a consideration to be spared, would seem entitled to have the consideration which he parted with returned to him. Yet there would be no basis in which the court could enter a judgment for defendant for the amount due him.

There are three potential solutions to this problem. The first is that reached in the Carruth case -- allowing the plaintiff to proceed despite the potential inequity to the defendant. This solution may be satisfactory in a case like Carruth where the defendant presumably anticipated that the money paid for the release would be spent by the plaintiff before he discovered the fraud. Under the recently enacted New York statute terminating the requirement of a pre-action tender of restoration and authorizing conditional judgments the same result is apparently reached without regard to the particular equities. Secondly, the plaintiff might be required to bring an independent action to rescind the release in which a conditional judgment of rescission might be entered entitling the plaintiff to assert his underlying cause of action only upon repaying the sum received for the release. Finally, the plaintiff might be permitted to sue directly

upon his underlying claim, asserting an ancillary claim for rescission of the release, but required to stipulate to the entry of a judgment against him if he succeeds in establishing his right to rescind but does not recover on his underlying claim an amount in excess of the sum he had received for his release. The court could then enter a judgment for the defendant in the amount received by the plaintiff for the release should the plaintiff fail to prevail upon his underlying claim or for the difference between the amount received by the plaintiff for the release and the amount of the verdict in his favor on his underlying claim should he establish his underlying claim but obtain a verdict on it in an amount less than the sum received for the release. The last solution would be fair to both parties and procedurally most expeditious. It should be noted, however, that in some such cases the plaintiff might be financially unable to respond to a judgment for defendant.

Another justification -- or rationalization -- which is frequently offered for the requirement of an offer of restoration prior to suit is that the defendant might accept the offer and return the consideration, thus ending the necessity for a law suit. But the danger that needless actions would be brought if the restoration requirement were withdrawn hardly seems a serious one. Rare indeed would be the party who would hazard a law suit without first assuring himself that he could not procure full redress without one. The experience respecting actions to obtain a rescission -- which in most jurisdictions may be brought without prior offer to restore -- would seem ample to show that unnecessary litigation is not more likely where an offer to restore is not a condition than where it is a condition to the commencement of the action.

C - The Time Within Which an Action Respecting Rescission Must be Commenced

Another question the solution to which may be obscured by the present dual procedural provisions is that respecting the timeliness of the plaintiff's efforts to seek relief. This problem has multiple aspects, for there are separate concepts which may bar an action respecting rescission: the running of a statute of limitations, laches, or the failure to act promptly to rescind.

Determining whether the statute of limitations has run before the initiation of an action respecting rescission may be a complicated matter. The statute of limitations on a cause of action to obtain a rescission by court decree begins to run, except in the case of fraud or mistake, at the time that the ground for rescission accrues. Thus, the statute governing a cause of action to obtain a rescission for duress would start to run at the time the contract was entered into, while that governing a cause of action to obtain a rescission for breach of contract would start to run at the time of the breach.[61] In instances of fraud and mistake, the cause of action to obtain a rescission accrues at the time that the ground for relief is discovered.[62] Yet, although the operative facts providing the basis for relief are precisely the same where a plaintiff rescinds himself and sues to enforce his rescission, the courts have held that the cause of action for the enforcement of an out-of-court rescission does not accrue until the time when the out-of-court rescission takes place.[63] Thus, for instance, a party who is induced by fraud to enter into a contract has one cause of action -- that to obtain rescission by judicial decree -- which accrues when the fraud is first discovered and, potentially, another -- that for the enforcement of an out-of-court rescission -- which will not accrue until such time as the aggrieved party, by making an offer to the other party to restore what he has received, perfects this cause.

In most instances, however, the requirement of Section 1691 that the aggrieved party rescind promptly if proceeding on an out-of-court rescission will terminate his cause of action to enforce a rescission, perhaps even before the statute has run on his action to obtain a rescission.[64] Yet, this will not be true as a matter of course. Pursuant to 1691(1), the requirement of promptness is limited to cases where the aggrieved party knows of his rights and is free of duress. One falling within the exceptions to the promptness condition might perfect his cause of action promptly on learning his rights and bring his action perhaps long after the statute had run on the cause of action to obtain a rescission.

The time of accrual of the cause of action, moreover, is not the only dilemma, for the dual procedures also give rise to duality in classifying what is in essence a single right to relief for purposes of determining what statute of limitations is applicable. Thus, where fraud or mistake is the substantive ground for relief the governing limitation, where the action is to obtain a rescission, is the three year period prescribed in Section 338(4) of the Code of Civil Procedure.[65] Where the substantive ground is breach, an action to obtain a rescission either could be viewed as falling within the residual four-year period provided for by Section 343 of the Code of Civil Procedure or could be viewed as an action upon a contract governed by the four-year period provided in Section 337, if in writing, or the two-year period established by Section 339(1), if not in writing.[66] Actions to obtain a rescission premised on other substantive grounds would presumably fall within the residual four-year provisions of Section 343. Yet, whether the original contract was written or oral and whatever the substantive ground for rescinding it, if the plaintiff proceeds on the theory of an action to enforce an out-of-court rescission he is viewed as suing upon an implied in

law contract governed by the two-year limitation period established by Section 339(1).[67]

Taking account both of the peculiarities incident to determining when an action accrues and of the fortuities which enter into determining what limitation period governs, it is patent that irrational and perhaps discriminatory results may be reached in some situations. There is no conceivable reason why different limitations period should apply and different accrual times should govern, depending upon whether the action is deemed to be one to obtain or one to enforce a rescission.

There may also be differences between the standards of timeliness, aside from limitations, which are applied in actions to enforce a rescission and those which are applied in actions to obtain rescission. Section 1691(1) of the Civil Code provides that an out-of-court rescission, unless accomplished by agreement, can be achieved only if the aggrieved party acts promptly upon discovering the facts entitling him to rescind. While the courts have been liberal in construing this provision in situations where delay has been caused by acts of the guilty party -- as, for instance, where the party guilty of fraud forestalls prompt rescission by continued assurances that he will make good his misrepresentations -- it seems that long delay may foreclose out-of-court rescission [wholly] regardless of whether the defendant is seriously prejudiced by it.[68] The provisions of Sections 3406 to 3408 providing for the action to obtain a rescission do not contain a comparable requirement of promptness. Accordingly, where the plaintiff seeks a decree of rescission, the governing standard of timeliness is the equitable standard of laches. And in elaborating the content of this standard, the courts -- following the historic equity tradition[69] -- are more likely to be influenced by the question whether the defendant has actually been prejudiced by the

delay. It is not possible to point to specific cases which seem clearly to have turned upon the alternative standards of timeliness; the distinctions between the standards are not that sharply defined. Nonetheless, the existence of theoretically different standards which may, at times, beget disparate results where no consideration of policy calls for differentiation adds an arbitrary factor to litigation which ought to be extracted from it.

Furthermore, when the plaintiff relies on an out-of-court rescission, the question is not whether he brings his action promptly, but whether he gives the requisite notice and makes the requisite offer to restore promptly. Once he has done this he has perfected his claim and may presumably then wait the full period of the governing statute of limitations before suing for enforcement. Yet, when the theory of the action is a suit to obtain a rescission by the court decree, the doctrine of laches requires that the action itself be initiated in timely fashion.

The existence of these complicated and variegated requirements respecting timeliness, is, then, another reason why the dual procedure might well be abandoned. Should a single rescission procedure be established, it would seem expedient to enact a single limitation period and to provide that relief be denied, regardless of the formal limitations period, where delay by the plaintiff in bringing his action has caused prejudice to the other party. A single limitation procedure would end existing confusion and doubt. And under a merged procedure there is no impediment to the use of the more flexible equitable concept of laches rather than the imperative legal standard of promptness, thus assuring first that the rescinding party does not, by irresolute conduct, impose upon the other party and secondly that the rescinding party not be required at his peril to act with

precipitate haste where delay and deliberation will not adversely affect the other party's interests. Rescission, after all, is but another remedy, often alternative to more common damage remedies. So long as delay is not prejudicial to the party against whom rescission is sought, no reason suggests itself why the right to rescind should be cut off prior to the running of the statute of limitations when other remedies are not.

D - The Availability of the Provisional Remedy of Attachment in Actions Respecting Rescission

Another distinction between the two rescission procedures which has generated considerable litigation and discussion concerns the availability of the provisional remedy of attachment. Attachment is available in California in actions founded upon "a contract, express or implied, for the direct payment of money," either where the claimant holds no security to assure performance or where the defendant does not reside or cannot be found within the State.[70] Inasmuch as an action to enforce a rescission by procuring a money judgment in the amount of any sum paid under the contract or in an amount equivalent to the value of property conveyed or services rendered under it (as distinguished from an action to enforce a rescission by procuring specific restitution of property conveyed) is considered as one to enforce an implied in law contract arising at the time the out-of-court rescission is accomplished, attachment is available in such actions in situations where the defendant is absent or where plaintiff is not able to assert a lien or otherwise to obtain security for his claim.[71]

Where the action is one to obtain a rescission, it is generally assumed that attachment is not available, inasmuch as the theory of such actions is not that an implied contractual duty exists when the action is brought but

that such a duty first arises only when the court decrees rescission.[72] It should be noted, however, that the court has frequently ruled that an attachment may be had even though equitable relief, such as the cancellation instrument, is being requested, so long as the basis for the money judgment sought is quasi-contractual.[73] Accordingly, a plaintiff could complete an out-of-court rescission, and bring his action on the theory that this gave him a quasi-contractual cause of action, and so obtain an attachment, yet procure ancillary equitable relief.

If a single procedure for rescission is established, it would seem appropriate to provide that one seeking to rescind be afforded the provisional remedy of attachment when no other security is available to him. One seeking rescission, like one asserting rights under a contract, is making a claim for a specific, not a speculative, sum. If he prevails, he will likely recover the full amount he is claiming. Indeed, inasmuch as he will usually be able to determine with reasonable precision both the value of the things he has given under the contract and the amount he has received which must be offset, he is likely to be able to anticipate the amount of the award with greater accuracy than will the claimant asserting a right to compensatory damages for breach of a true contract and who may be permitted to prove by somewhat speculative evidence the amount of lost profits. Accordingly, the ideal solution would entail legislation making attachment available in all rescission actions where a money judgment, rather than specific restitution, was prayed and where either the defendant was absent or the claimant had no security available to him.

E - Joinder of Other Claims in Actions Respecting Rescission

Under present law, unrelated contractual and quasi-contractual causes of action may be joined with a claim to enforce a rescission by obtaining a money judgment, the latter being a claim on an "implied contract" within the meaning of Section 427(1) of the Code of Civil Procedure. But if the plaintiff seeks a decree of rescission it appears that he may not join unrelated contractual or quasi-contractual claims, no implied contract being involved in the legal theory upon which such an action is bottomed.[74]

Since the two types of rescission actions involve the same issues and are directed toward achieving the same ultimate relief, there is no reason why a distinction should be drawn. Thus it would seem appropriate either to preclude joinder of unrelated claims in all rescission actions or to treat all rescission actions like other contract actions, authorizing joinder of unrelated contractual and quasi-contractual claims in all such cases. In keeping with legislative trends toward facilitating joinder of causes so as to expedite the resolution of all matters at issue between the parties,[75] should a single rescission procedure be adopted, it would seem most appropriate to authorize joinder of contractual and quasi-contractual claims with all claims for rescission.

F - Jurisdiction of Trial Courts in Actions Respecting Rescission

The net effect of the jurisdictional provisions affecting rescission actions is this: The superior court has exclusive jurisdiction of all actions respecting rescission where the amount in controversy exceeds $3,000.[76] The municipal courts have jurisdiction over all rescission actions involving an amount in controversy not in excess of $3,000.[77] The justice

courts have jurisdiction concurrent with the municipal courts[78] over all actions to enforce a rescission, other than those involving title to real property, where the amount in controversy does not exceed $500.[79] Thus, with respect to actions not involving title to real property and entailing a controverted sum of $500 or less, whether the action is cognizable in both the municipal courts and the justice courts or, alternatively, only in the municipal courts, will depend upon whether the action is in form one to enforce a rescission or one to obtain a rescission.

Before the municipal courts were given jurisdiction over actions to obtain a rescission, whether jurisdiction of an action respecting rescission involving a controverted sum not exceeding the maximum limit of municipal court jurisdiction was in the municipal or the superior court depended upon whether the action was one to obtain or to enforce a rescission.[80] This distinction was a recurrent source of confusion, litigation and critical comment.[81] Although that distinction has been legislatively eradicated, substantially the same distinction currently prevails between the jurisdiction of the municipal and justice courts.

Should a single procedure be substituted for the present dual procedures it would seem expedient to withdraw jurisdiction from the justice courts, particularly if the requirement of a prior offer to restore should be eliminated. Rescission actions, even when denominated legal, may involve complicated issues of a traditionally equitable character respecting the extent of restoration required and the timeliness of suit. Inasmuch as the Legislature has not seen fit in the past to grant such comprehensive jurisdiction to the justice courts but has generally restricted justice court jurisdiction to cases involving narrower issues of law, it would seem appropriate to confer jurisdiction in rescission actions under a unitary procedure only in the superior courts and the municipal courts.

G - The Use of the Common Counts

Another distinction between the two rescission procedures which has caused some comment is a pleading difference: The common counts obviously cannot be used in an action to obtain a rescission, but an action to enforce a rescission by procuring a money judgment, being quasi-contractual in nature, may be sufficiently pleaded as a claim for money had and received, at least where the plaintiff has received nothing under the contract.[82] Thus, one seeking rescissionary relief may obscure the nature of his claim, even where fraud is involved, by choosing to proceed at law, rather than in equity.

Inasmuch as the substitution of a unitary for the present dual rescission would necessitate a prayer for a decree of rescission in all cases, the change herein suggested would necessitate the use in all rescission cases of the more informative pleading which prevails, under Code of Civil Procedure § 426, with respect to complaints generally. This change would seem to be a salutary one.

IV. Suggested Legislation

In order to accomplish the objective indicated in part III of this study, the following legislative changes are suggested: 83

1. Sections 3406 through 3408 of the Civil Code should be repealed.

Comment: Inasmuch as a unitary rescission procedure is recommended, it is necessary to repeal in toto either the existing provisions respecting out-of-court rescission (which may provide a basis for an action to enforce a rescission) or the existing provision respecting actions to obtain rescission. The present provisions respecting out-of-court rescission are more comprehensive than those respecting actions to obtain a rescission. Therefore, it would seem expedient to repeal the latter and amend the former so as to accomplish the desired changes.

2. Section 1688 of the Civil Code should be amended to read as follows:

"A contract is extinguished by its rescission. A rescission is accomplished only when all of the parties have agreed to rescind and such agreement has been executed or when rescission has been adjudged pursuant to the provisions of sections 1689 through 1692 of this Code."

Comment: This change is intended to show that a rescission can be accomplished only by an executed agreement to rescind or by a court decree and that the concept of a unilateral out-of-court rescission which may be enforced by a court action not involving an adjudication of rescission is abandoned.

3. Section 1689 of the Civil Code should be amended to read as follows:

"The rescission of a contract may be adjudged, on application of a party aggrieved, ~~a party to a contract may rescind the same~~ in the following cases only:

"1. If the consent of the party rescinding, or of any party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he rescinds, or of any other party to the contract jointly interested with such party;

2. If, through the fault of the party as to whom he rescinds, the consideration for his obligation fails, in whole or in part;

3. If such consideration becomes entirely void from any cause;

4. If such consideration, before it is rendered to him, fails in a material respect, from any cause;

5. By consent of all the other parties; ~~or~~

6. Under the circumstances provided for in sections 1785 and 1789 of this code;

7. Where the contract is unlawful for causes which do not appear in its terms and conditions, and the parties were not equally at fault; or

8. When the public interest will be prejudiced by permitting it to stand."

Comment: The change in the introductory phrase is necessary in light of the abandonment of the concept of out-of-court rescission which might be made the basis for an action to enforce a rescission and to make it clear that if one of the parties refuses to execute a rescission, rescission can only be accomplished by a decree of a court. The introductory phrase proposed to be substituted for the present one

is taken from Section 3406 of the Civil Code which, pursuant to proposal "1" above, would be repealed.

The subparagraphs proposed to be added to Section 1689 incorporate the grounds for rescission which presently appear in Section 3406 but not in Section 1689. The proposed language is taken directly from Section 3406.

4. Section 1690 of the Civil Code should be amended to read as follows:

"A stipulation that errors of description shall not avoid a contract, or shall be the subject of compensation, or both, does not take away the right ~~of rescission~~ to have rescission adjudged for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation."

Comment: The purpose of this change is to substitute a reference to adjudication of rescission for the present reference to out-of-court rescission.

5. Section 1691 should be repealed and a new Section 1691 enacted, reading as follows:

"1. A party who in a complaint, answer or cross-complaint, or by way of reply, as provided in subparagraph of this section, asserts a claim to have the rescission of a contract adjudged, shall not be denied relief, whether such relief would have formerly been denominated legal or equitable, because of a failure before judgment to restore or to offer to restore the benefits received under such contract, or to give notice of rescission to the other party.

2. The court may refuse to adjudge a rescission of the contract if the claim for rescission is not asserted promptly after the discovery of the facts which entitle the party to have a rescission adjudged and if such lack of promptness has been prejudicial to the other party.

3. The court may make a tender by the rescinding party of restoration of the benefits received by him under a contract a condition of a judgment of rescission.

4. Where a release is pleaded in an answer to a claim asserted in a complaint or cross-complaint, or is introduced as a defense to a claim asserted in a counterclaim, the party asserting the claim may serve and file a reply stating a claim to have the rescission of the release adjudged. If such a reply be filed and served, the court shall determine separately, or shall require the jury to render separate verdicts upon, whether the rescission of the release should be adjudged and whether the party asserting the claim for which the release was given is otherwise entitled to judgment upon the claim. If the party asserting the claim is not entitled to rescission of the release, the release shall be accorded such effect as it may be entitled to as a defense to the claim. If the party asserting the claim is entitled to rescission of the release, rescission of the release shall be adjudged, and the release shall be accorded no effect as a defense to the claim, but whether or not the party asserting the claim recovers a judgment thereon, a separate judgment shall be entered in favor of the party who pleaded or introduced the release in the amount of the value of any benefits which were conferred by said party upon the party asserting the claim in exchange for the release.

Comment: Subparagraph "1" of this proposed section (based on Section 112-g of the N.Y. Civil Practice Act) is intended to do away with the requirement, now applicable in actions to enforce an out-of-court rescission, that the rescinding party give notice of rescission and make an offer to restore prior to commencement of the action.

Subparagraph "2" makes applicable in all rescission actions, whether formally denominated legal or equitable, the equitable standard of laches and the equitable technique of the conditional decree to assure that the status quo is re-established.

Subparagraph "3" authorizes conditional judgments where necessary to reinstate the status quo.

Subparagraph "4" authorizes a party asserting a claim to which a release has been pleaded to assert in the same action a claim for rescission of the release and provides that in such a case, should rescission of the release be granted, a judgment should be entered for the other party for the restoration of benefits paid for the release.

6. A new Section 1692 should be added to the Civil Code, reading as follows:

Where a party in an action or by way of defense, counterclaim or reply seeks to have the rescission of a contract adjudged, any party shall be entitled to a jury trial upon the issues so raised."

Comment: This proposed section is intended to assure to each party to an action where rescission is sought a right to a jury trial.

7. Section 338 of the Code of Civil Procedure should be amended to read as follows:

"Within three years:

1. An action upon a liability created by statute, other than a penalty or forfeiture.

2. An action for trespass upon or injury to real property.

3. An action for taking, detaining, or injuring any goods, or chattels, including actions for the specific recovery of personal property.

4. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

5. An action upon a bond of a public official except any cause of action based on fraud or embezzlement is not to be deemed to have accrued until the discovery, by the aggrieved party or his agent, of the facts constituting said cause of action upon the bond.

6. An action against a notary public on his bond or in his official capacity except that any cause of action based on malfeasance or misfeasance is not deemed to have accrued until discovery, by the aggrieved party or his agent, of the facts constituting said cause of action; provided, that any action based on malfeasance or misfeasance shall be commenced within one year from discovery, by the aggrieved party or his agent, of the facts constituting said cause of action or within three years from the performance of the notarial act giving rise to said action, whichever is later; and provided further, that any action against a notary public on his bond or in his offical capacity must be commenced within six years.

7. An action to have the rescission of a contract adjudged and to recover for benefits conferred pursuant to said contract, whether such relief would have formerly been denominated legal or equitable and whether the party seeking to have the rescission adjudged seeks specific restitution of benefits conferred or their value. Where the ground for rescission is fraud, or mistake, the cause of action to have a rescission adjudged shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

Comment: This proposal is intended to establish a uniform statute of limitations in actions for rescission. The provision respecting the accrual of the cause of action for rescission for fraud or mistake is intended to conform this limitation period to that provided by Code of Civil Procedure § 338(4) for other actions for relief on the grounds of fraud or mistake. The time of accrual with respect to other grounds will be governed by the general rule elaborated by the courts that the cause of actions accrues as soon as an action might be brought. For example, a cause of action for rescission of a contract for breach would accrue, just as would an action for compensatory damages for breach, at the time of the breach.

8. Section 537(1) of the Code of Civil Procedure should be amended to read as follows:

"1. In an action upon a contract, express or implied, for the direct payment of money, where the contract is made or is payable in this State, and is not secured by any mortgage, deed of trust or lien upon real or personal property, or any pledge of personal property, or, if originally so secured, such security has, without any act of the plaintiff, or the person to whom the security was given, become valueless; provided, that an action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for the support, maintenance, care or necessaries furnished to the other spouse, or other relatives or kindred and an action to have the rescission of a contract adjudged and to recover a money judgment for the value of benefits conferred under such contract, whether such relief would formerly have been denominated legal or equitable, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section."

Comment: The purpose of this proposed change is to make it clear that a party seeking to rescind a contract and to recover a money judgment may have the provisional remedy of attachment in all circumstances where such remedy would be available to a party asserting a claim to enforce a contract.

9. Section 427(1) of the Code of Civil Procedure should be amended as follows:

"1. Contracts, express or implied; provided, that an action to have the rescission of a contract adjudged, whether such relief would formerly have been denominated legal or equitable, shall be deemed to be an action upon an implied contract within that term as used in this subdivision of this section."

Comment: The purpose of this proposed change is to make it clear that unrelated contract and quasi-contract claims may be joined with claims for rescission whether the claim for rescission would formerly have been denominated legal or equitable.

10. Section 112(a) of the Code of Civil Procedure should be amended as follows:

"In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to five hundred dollars ($500) or less, except cases at law which involve the title or possession of real estate or the legality of any tax, impost, assessment, toll or municipal fine, or actions for the rescission of a contract;"

Comment: Under the provisions of Code of Civil Procedure § 89(c) the municipal courts have jurisdiction of actions to cancel or rescind a contract when such relief is sought in connection with an action to recover money not exceeding $3,000 or property not exceeding a value

of $3,000. Under the provisions of Code of Civil Procedure § 112(a) the justice courts have concurrent jurisdiction over actions to enforce a rescission (i.e., an action formally denominated legal) when such action is brought to recover money not exceeding $500 or property, other than real estate of a value not exceeding $500. The proposed change would divest the justice courts of this concurrent jurisdiction which depends upon whether the action be denominated legal or equitable.

FOOTNOTES

1. It is essential to recognize that rescission is a commodious remedy available to redress various wrongs which, generically, are sharply distinguishable each from the others. Rescission by agreement, for instance, is contractual in nature. An action to enforce such an agreement or to procure a decree of rescission because of such an agreement is, in essence, an action to enforce a contract which presumably would be enforceable at least by an action for damages for breach pursuant to general contract principles wholly regardless of the code provisions respecting rescission. Rescission upon failure of consideration includes cases where there is a breach (so that rescission is a mode of obtaining restitutionary damages as an alternative to compensatory damages) as well as cases where the failure of consideration results from such factors as impossibility (so that rescission is the only mode of redress available to the aggrieved party). Rescission for mistake, duress, menace or undue influence, by contrast, is a remedy by means of which a party may be relieved of the burdens and may procure restitutionary redress respecting a contract which was defective at its inception because consent was not freely or knowlingly given. Rescission for illegality, finally, is a remedy which enables a party, in the circumstances specified, to procure restitutionary relief with respect to a contract which was never enforceable at all.

2. E.g., Philpott v. Superior Court, 1 Cal.2d 512, 36 P.2d 635 (1934); McCall v. Superior Court, 1 Cal.2d 527, 36 P.2d 642 (1934).

3. E.g., Wendling Lumber Co. v. Glenwood Lumber Co., 153 Cal. 411, 95 Pac. 1029 (1908).

4. E.g., McNeese v. McNeese, 190 Cal. 402, 213 Pac. 36 (1923); cf. Alder v. Drudis, 30 Cal.2d 372, 182 P.2d 195 (1947).

5. E.g., Empire Investment Co. v. Mort, 171 Cal. 336, 153 Pac. 236 (1915); Connolly v. Hingley, 82 Cal. 642, 23 Pac. 273 (1890).

6. E.g., Blahnik v. Small Farms Improvement Co., 181 Cal. 379, 184 Pac. 661 (1919).

7. E.g., Philpott v. Superior Court, supra, note 2.

8. E.g., Fairbairn v. Eaton, 6 Cal. App.2d 264, 43 P.2d 1113 (1935).

9. E.g., Rocha v. Rocha, 197 Cal. 396, 240 Pac. 1010 (1925); Fairbairn v. Eaton, supra, note 8; cf. C. C. § 3412.

10. E.g., More v. More, 133 Cal. 489, 65 Pac. 1044 (1901); Walsh v. Majors, 4 Cal.2d 384, 49 P.2d 598 (1935). Cf. Cal. Civ. Code § 3412.

11. At the request of the Commission, the details of the author's historical study of the separate developments of the law and equity rescission concepts are excluded from this report. The development respecting fraud and mistake will be briefly summarized without extended discussion of the case materials as illustrative.

12. 8 Holdsworth, History of English Law 67, et seq. (1926).

13. 5 Holdsworth, supra, note 12, at 292, 326, 328.

14. 1 Pomeroy, Equity Jurisprudence, § 115 (5th ed. 1941); McClintock, Equity (Hornbook Series 1948).

15. Astley v. Reynolds, 2 Str. 915 (1731); Attorney General v. Perry, 2 Comyns Rep. 481 (1733); Hogan v. Shee, 2 Esp. 522 (1797). See generally, Jackson, History of Quasi-Contract §§ 18, 21, 22(3) (1936).

16. Tomkins v. Bernet, 1 Salk. 22 (1693). See 8 Holdsworth, supra, note 12, at 94; Jackson, supra note 15, at 74.

17. E.g., Bonnel v. Foulke, 2 Sid. 4 (1657). See Jackson, supra, note 15, at 58.

18. E.g., Cory v. Hotailing, 1 Hill 311 (N.Y. 1841). As late as 1908 the California Supreme Court referred to a contract procured by fraud as void, but this was merely an artless use of words rather than a confusion as to the theory upon which relief was granted as the court's opinion on rehearing shows. Wendling Lumber Co. v. Glenwood Lumber Co., supra, note 3.

19. E.g., Edmeads v. Newman, 1 B. & C. 418 (1823). Compare Clarke v. Dickson, E.B. & E. 148 (1858) (relief in assumpsit not available when plaintiff has not rescinded by tendering a return of what he received).

20. See generally, Harrison, The First Half Century of the California Civil Code, 10 Cal. L. Rev. 185 (1922).

21. Stat. 1931, Ch. 1070.

22. Stat. 1953, Ch. 588.

23. See Smith v. Bromley, 2 Doug. 696 (N.P., 1760); Clarke v. Shee, 1 Cowp. 197 (K.B., 1774); Wade, Rescission of Benefits Acquired Through Illegal Transactions, 95 Pa. L. Rev. 261 (1947).

24. Calif. Const., Art. I § 7.

25. See, e.g., Ripling v. Superior Court, 112 Cal. App.2d 399, 402, 247 P.2d 117, 119 (1952), where the court said that "the problem of right to jury trial must still be approached in the context of 1850 common law pleading." See also Ito v. Watanabe, 213 Cal. 487, 2 P.2d 799 (1931); Philpott v. Superior Court, supra, note 2.

26. Bank of America National Trust & Savings Association v. Greenbach, 98 Cal. App.2d 220, 219 P.2d 814 (1950); cf. Ito v. Watanabe, supra, note 25; Lawrence v. Ducommun, 14 Cal. App.2d 395, 58 P.2d 407 (1936).

27. Ito v. Watanabe, supra, note 25; Davis v. Security-First National Bank of Los Angeles, 1 Cal.2d 541, 36 P.2d 649 (1934).

28. E.g., Rocha v. Rocha, supra, note 9.

29. E.g., Davis v. Security-First Nat. Bank of Los Angeles, supra, note 27.

30. Supra, note 8.

31. Mesenburg v. Dunn, 125 Cal. 222, 57 Pac. 887 (1899) (rescinding vendee of real estate permitted to proceed by way of an action to obtain a rescission, thus depriving vendor of jury trial, though the only relief sought in addition to a money judgment was the superfluous cancellation of a written contract of sale). See also Whittaker v. E. E. McCalla Co., 127 Cal. App. 583, 16 P.2d 282 (1932); Ingalls v. Superior Court, 112 Cal. App. 453, 9 P.2d 266 (1932); Jensen v. Harry H. Culver & Co., 127 Cal. App. 783, 15 P.2d 907 (1932); Freligh v. McGrew, 95 Cal. App. 251, 272 Pac. 791 (1929), all of which suggest the unrestricted availability of the action to obtain a rescission.

32. E.g., Witkin, 1 Calif. Procedure, Actions §§ 24,26, 29 (1954); Koford, Rescission at Law and In Equity, 36 Cal. L. Rev. 606 (1948).

33. See, e.g., Lambertson v. National Investment & Finance Co., 200 Iowa 527, 202 N.W. 119 (1925); Bailey v. B. Holding Co., 104 N.J. Eq. 241, 144 Atl. 870 (1929); True v. J. B. Deeds & Sons, 151 Tenn. 630, 271 S.W. 41 (1924); Annot. : 95 A.L.R. 1000 (1935). In England, the courts of equity have jurisdiction when fraud is alleged even though only a money judgment is sought. Hill v. Lane, L.R. 11 Eq. 215 (1870). The prevailing rule in the United States, however, has been to the contrary. McClintock, supra, note 14, § 50.

34. For example, in Feary v. Gough, 61 Cal. App.2d 778, 143 P.2d 711 (1943), plaintiff sought to charge the defendant as an involuntary trustee of one-half of a sum given by her husband to the defendant out of community property without the plaintiff's consent. The court held that the claim was

in essence one for money had and received and that the prayer for that the court decree a constructive trust, absent allegations indicating that the legal remedy was inadequate, could not serve to convert the action into an equitable one without the jurisdiction of the municipal court. See also Mortimer v. Loynes, 74 Cal. App.2d 160, 168 P.2d 481 (1946) (action for fraudulent profits of fiduciary in a specified sum, no anciallary equitable relief being required, must be viewed as an action at law entitling defendant to jury trial, though plaintiff prays that defendant be charged as a constructive trustee.

35. See, e.g., Matteson v. Wagoner, 147 Cal. 739, 82 Pac. 436 (1905); Rocha v. Rocha, supra, note 9. In other contexts the court has explicitly recognized that the plaintiff ought not to be able to deprive the defendant of important procedural protections by proceeding in equity rather than at law. Indeed, it seems to have been this notion which led the court to hold for so long a period that an offer of restoration was a condition to an action to obtain a rescission as well as to an action to enforce a rescission. See note 40, infra, and text thereto. Thus, in Kelley v. Owens, 120 Cal. 502, 47 Pac. 369, 371 (1898), the court said: "[The plaintiff] cannot, in a plain case, escape the consequences of a failure to himself take the proper steps to rescind by simply casting his complaint in the mold of a bill in equity to rescind." See also, More v. More, supra, note 10, at 65 Pac. 1046 where the court said that a court of equity "may refuse to exercise the power, [to decree rescission] in certain cases, for failure of the injured party to avail himself of his right to rescind [out of court]" and Crouch v. Wilson, 183 Cal. 576, 191 Pac. 916 (1920), in which a decree of rescission was denied under circumstances where an out-of-court rescission would have afforded adequate relief, though not expressly on this ground.

36. Supra, note 2.

37. E.g., Gould v. Cayuga County National Bank, 86 N.Y. 75 (1881).

38. See Restatement, Restitution § 65, (1937); Restatement, Contracts § 480 (1932); e.g., Bell v. Anderson, 74 Wis. 638, 43 N.W. 666 (1889); Southern Bldg. & Loan Ass'n v. Argo, 224 Ala. 611, 141 So. 545 (1932).

39. E.g., Allerton v. Allerton, 50 N.Y. 670 (1872); Lightner v. Karnatz, 258 Mich. 74, 241 N.W. 841 (1932); Jones v. McGonigle, 327 Mo. 457, 37 S.W.2d 892 (1931).

40. See, e.g., Crouch v. Wilson, supra, note 35; California Farm & Fruit Co. v. Schiappa-Pietra, 151 Cal. 732, 91 Pac. 593 (1907); Kelley v. Owens, supra, note 35; Gifford v. Carvill, 29 Cal. 589 (1866). But cf. More v. More, supra, note 10.

41. The first indication that the supreme court was prepared to abandon the requirement of a pre-action offer to restore in actions to obtain a rescission came in McCall v. Superior Court in which the court spoke critically of the cases failing to distinguish between the two types of actions. Supra, note 2, at 1 Cal.2d 535, 36 P.2d 646. More recently, in Siegar v. Odell, 18 Cal.2d 409, 115 P.2d 977 (1944), the court held, without even referring to the contrary line of cases, that notice of rescission and an offer to restore are not necessary in an action to obtain a rescission. Some question has been raised whether King v. Mortimer, 37 Cal.2d 430, 435, 233 P.2d 4, 7 (1951), in which the court indicated (inter alia) that plaintiffs seeking ancillary equitable relief conjunctively with rescission could not recover because their offer to rescind and restore was not timely does not harken back to the older California rule. That case, however, need not be read as a rejection of the positive teaching of the Odell decision. In the King case, the plaintiffs proceeded upon the theory

of a prior out-of-court rescission and a legal enforcement action in which ancillary equitable relief was being requested as the Philpott case, supra, note 2, indicated it might be. Thus, plaintiffs specifically alleged that they had rescinded prior to bringing the action. Presumbaly the plaintiff adopted this alternative in the hope of avoiding the defense of laches which would likely have foreclosed recovery if the action was couched as one to obtain a rescission. In any event, the plaintiffs having relied on their own attempt to rescind out of court, the fact that the court evaluated the timeliness of this attempt rather than the timeliness of the action itself is hardly a definitive indication that the court is prepared to retreat from the position taken in the Odell case. That Odell is still law is indicated, moreover, by the decision in Strain v. Security Title Ins. Co., 124 Cal. App.2d 195, 268 P.2d 167 (1954), in which the court cited it in emphasizing the breadth of the power possessed by a court in a proceeding historically equitable to enter a conditional decree.

42. The most extensive judicial discussions of the situations in which a pre-action offer of restoration is unnecessary are contained in dicta in Kelley v. Owens, supra, note 35, and California Farm & Fruit Co. v. Schiappa-Pietra, supra, note 40. The following is the usual classification: (1) Where the rescinding party will be entitled to keep what he has received whether he established a basis for rescission or not. See, e.g., Matteson v. Wagoner, supra,note 35 (plaintiff lender seeking to rescind loan agreement need not offer to restore interest payments received inasmuch as if basis for rescission is established interest received can be off-set against the judgment and if basis for rescission is not established plaintiff will be entitled to keep the interest pursuant to the agreement). (2) Where the transaction is so complicated that an accounting is necessary

to determine the amount which will be due to each party in order to re-establish the status quo. See, e.g., Sutter Rr. Co. v. Baum, 66 Cal. 44, 4 Pac. 916 (1884); California Farm & Fruit Co. v. Schiappa-Pietra, supra, note 40. (3) Where the thing received by the plaintiff is of no value. See, e.g., Kelley v. Owens, supra, note 35. (4) Where, without fault of the plaintiff, it became impossible for him to restore before he discovered the ground for rescission. See, e.g., More v. More, supra, note 10; Carruth v. Fritch, 36 Cal.2d 426, 224 P.2d 702 (1950) (offer to restore money received for release of personal injury claim induced by fraud where money spent, as defendant knew it would be, for medical treatment before discovery of the fraud); Steglmore v. Vandeventer, 57 Cal. App.2d 753, 135 P.2d 186 (1943); Ziller v. Milligan, 71 Cal. App. 617, 236 Pac. 349 (1925).

The cases holding that an offer to restore is excused have also held that a notice of rescission prior to suit is excused. E.g., Hartwig v. Clark, 138 Cal. 668, 72 Pac. 149 (1903); California Farm & Fruit Co. v. Schiappa-Pietra, supra, note 40. This is consistent with the general rule in other jurisdictions under which the requirement of notice is treated as being of a piece with the requirement of an offer or tender of restoration. See, e.g., Harding v. Olsen, 177 Ill. 298, 52 N.E. 482 (1898); Herbert v. Scanford, 12 Ind. 503 (1859), Parker v. Simpson, 180 Mass. 334, 62 N.E. 401 (1902); Angel v. Columbia Canal Co., 69 Wash. 550, 125 Pac. 766 (1912). Accordingly, the requirement of notice will be treated herein as an aspect of the requirement of an offer to restore and will not be separately discussed.

43. Cf. Pendell v. Warren, 101 Cal. App. 407, 281 Pac. 658 (1929) (rescinding vendee liable for the use value of trunk purchased

during time, beyond period necessary to test it, during which he had the possession and use of it).

43a. See, e.g., Crouch v. Wilson, supra, note 35 (letter offering "to rescind," but without specific offer to restore, insufficient).

44. Patterson, Improvements in the Law of Restitution, 40 Cornell L.Q. 667 (1956).

45. Cal. Civ. Code § 3300. See generally, Restatement, Contracts § 329 (1932) and California Annotations thereto.

46. E.g., Alderson v. Houston, 154 Cal. 1, 96 Pac. 884 (1908).

47. E.g., Blair v. Brownstone Oil & Refining Co., 35 Cal. App. 394, 170 Pac. 160 (1917) (Upon repudiation by the owner of a contract to drill a well, the contractor may recover the amount he had expended in part performance and in preparing to perform); Grosse v. Petersen, 30 Cal. App. 482, 158 Pac. 511 (1916) (Upon breach by manufacturer of a contract to manufacture soap to buyers' specifications buyer may recover cost of ingredients furnished by him to manufacturer less the amount received by buyer on resale of soap manufactured and delivered to him under the contract). See generally, Restatement, Contracts § 333 (1932), and California Annotations thereto.

48. For instance, in Grosse v. Petersen, supra, note 45, plaintiff was permitted to recover the cost to him of his part performance in supplying ingredients to the defendant, without returning soap received under the contract, the proceeds therefrom being off-set against plaintiff's recovery. Had the plaintiff proceeded by way of a rescission, he would have recovered the value (as distinguished from the cost) of the ingredients delivered to the defendant, but an off-set of the value of soap delivered to the plaintiff under the contract would not have been appropriate. Plaintiff would not have

prevailed unless he was able to prove that he had returned to the defendant in specie the soap received under the contract. Compare Restatement, Contracts § 333 (1932) with Restatement, Contracts, § 349 (1932).

49. See generally, Restatement, Contracts § 349 (1932).

50. 30 Cal.2d 335, 182 P.2d 195 (1947).

51. Under the present code provisions the courts usually reach substantially this result where the right to rescind is first asserted defensively when the other party brings an action on the contract. See Boulevard Land Co. v. King, 125 Cal. App. 224, 13 P.2d 864 (1932); Elrod-Oas Home Building Co. v. Mensor, 120 Cal. App. 485, 8 P.2d 171 (1932), See also O'Meara v. Haiden, 204 Cal. 354, 268 Pac. 334 (1928) (offer after answer but before trial by rescinding party to restore consideration received is timely offer to rescind a release set up in answer as a defense to a claim for unliquidated damages).. However, the result is usually supported on the ground that the case falls within one of the exceptions to the requirement of a pre-action offer to restore and there are some cases indicating that such an offer of restoration is a condition to relief even where the right to rescind is first asserted in a cross-complaint to an action on the contract. E.g., Crouch v. Wilson, supra, note 35. Insofar as the danger persists that a party who is sued on the contract may be precluded from defending by way of rescission by his failure to anticipate the other party's action and offer restoration prior to its commencement, legislative change, such as that here suggested, is patently necessary in the interest of justice.

52. See, e.g., Campbell v. Kennedy, 177 Cal. 430, 170 Pac. 1107 (1918); Loud v. Luse, 214 Cal. 10, 3 P.2d 542 (1931); Henry v. Phillips, 163 Cal. 135, 124 Pac. 837 (1912); Cf. Dunn v. Stringer, 41 Cal. App.2d 638, 107

P.2d 411 (1940). There is also authority for the use of such a conditional judgment where the plaintiff rescinds out of court by a conditional offer to restore and, upon the defendant's refusal to accept the offer, brings an enforcement action at law. See, e.g., Colin v. Studebaker Bros. Co., 175 Cal. 395, 165 Pac. 1009 (1917). Yet, the California courts in view of the provisions of Cal. Civ. Code § 1691, have consistently refrained from using the conditional judgment as a technique for protecting the defendant, yet enabling the plaintiff to recover in an action at law without a prior offer to restore. E.g., Crouch v. Wilson, supra, note 35.

53. It has often been stated the courts of law cannot enter conditional judgments. See, e.g., Note, 29 Cal. L. Rev., 792 (1929); Restatement, Contracts § 481, Comment e (1932); Restatement, Restitution § 65, Comment d (1937). Yet, there is historical precedent for conditional judgments at law. The judgment in the action of detinue was always in the alternative, for goods or their value. See Martin, Civil Procedure at Common Law § 85 (1905). And in at least one early case it was assumed that a common law court possessed inherent power to make its judgment conditional. Sturlyn v. Albany, Cro. Eliz. 67 (1587).

54. E.g., Bentley v. Hurlburt, 153 Cal. 796, 96 Pac. 890 (1908) (remittitur).

55. Recently, the legislature of New York, on the recommendation of the New York Law Revision Commission (1946 Report, N.Y. Law Revision Comm'n 35), resolved the problem of confusing and inequitable distinctions between the restoration requirement in actions at law and in equity by enacting the following provision:

> A party who has received benefits by reason of a transaction voidable because of fraud, misrepresentation, mistake, duress, infancy or incompetency, and who,

> in an action or proceeding or by way of defense or counter claim, seeks rescission, restitution or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was voidable, shall not be denied relief because of a failure to tender before judgment restoration of such benefits; but the court may make a tender of restoration a condition of its judgment. N.Y. Civil Prac. Act. § 112-g (1946).

56. The following cases, which are discussed in Patterson, Restoration of Benefits Received by One Entitled to Avoid a Transaction, 1946 Report, N.Y. Law Revision Comm'n 41, 48, all indicate that a court of law may enter a conditional judgment to assure restoration in a rescission action: George v. Broden, 70 Pa. 56 (1871); Lakovic v. Campbell, 225 Mich. 1, 195 N.W. 798 (1923); Minnehoma Oil Co. v. Florence, 92 Okla. 17, 217 Pac. 443 (1923); Cain v. Norman, 140 Wash. 31, 248 Pac. 71 (1926). The above-cited study by Professor Patterson, undertaken at the request of the New York Law Revision Commission, contains an extended analysis of the law respecting restoration of benefits in rescission actions and has been extremely useful in the preparation of this part of this report. See also Colin v. Studebaker, supra, note 52, which indicates that a California court may enter a conditional judgment in a legal action to enforce a rescission where the rescinding party made a pre-action offer to restore which was rejected by the other party.

57. In Alder v. Drudis, supra, note 50, the plaintiff was suing for specific restitution of chattel given to defendant pursuant to a contract the consideration for which had failed. The trial court entered judgment for the return of the property although plaintiff had received and had failed to offer to restore $5,000 under the contract. On appeal, the court ruled that the judgment should have been made conditional upon the

return by the plaintiff to the defendant of this sum. The court viewed the action as one for restitution as an alternative remedy for breach affording a remedy which "approximates that reached by rescission." Id., p. 202.

58. In Engle v. Farrell, 75 Cal. App.2d 612, 171 P.2d 588 (1946), plaintiff vendee brought an action for money had and received to enforce a rescission of a land contract for fraud without having restored the deed to the defendant or, so far as the opinion discloses, having offered to restore it. Judgment was entered for the plaintiff on the verdict of the jury and the court ordered a new trial conditional upon the plaintiff tendering a deed to the defendant within a time specified. The plaintiff complied and the judgment was affirmed on defendant's appeal. See Note, 35 Cal. L. Rev. 150 (1947).

59. Supra, note 42. Compare O'Meara v. Haiden, supra, note 51.

60. See Ploof v. Somers, 282 App. Div. 798, 123 N.Y.S.2d 5 (1953).

61. Absent a specific statutory rule otherwise providing, a statute of limitations starts to run as soon as the cause of action accrues. See Cal. Code Civ. Proc. § 312; Lattin v. Gillette, 95 Cal. 317, 30 Pac. 545 (1892); 1 Witkin, Calif. Procedure, Actions § 112 et seq. (1954).

62. Cal. Code Civ. Proc. § 338 (4); Redpath v. Aagaard, 217 Cal. 63, 16 P.2d 998 (1932).

63. Taback v. Greenberg, 108 Cal. App. 759, 292 Pac. 279 (1930) (fraud); Rossi v. Jedlick, 115 Cal.App. 230, 1 P.2d 1065 (1931) (failure of consideration due to supervening illegality); Richter v. Union Land & Stock Co., 129 Cal. 367, 62 Pac. 39 (1900) (failure of consideration due to breach). But cf. Thomas v. Pacific Beach Co.,115 Cal. 136, 46 Pac. 899 (1892).

64. See 1 Witkin, Calif. Procedure, Actions § 141 (1954).

65. Redpath v. Aagaard, supra, note 62; Toomey v. Toomey, 13 Cal.2d 317, 89 P.2d 634 (1939), Zakaession v. Zakaession, 70 Cal. App.2d 721, 161 P.2d 677 (1945). If the purpose of the action is to recover real property, the five year statute, Cal. Code Civ. Proc. § 318, may apply. Murphy v. Crowley, 140 Cal. 141, 73 Pac. 820 (1903).

66. The fact that the contract provisions are generally applied regardless of the type of relief sought (See 1 Witkin, Calif. Procedures, Actions § 114 (1954)) and the fact that rescission actions premised on fraud are classified as fraud actions rather than as within the residual section both suggest that the later alternative would be adopted.

67. Thomas v. Pacific Beach Co., supra, note 63; cf. Taback v. Greenberg, supra, note 63; Rossi v. Jedlick, supra, note 63.

68. Estrado v. Alvarez, 38 Cal.2d 386, 240 P.2d 278 (1952) (Complaint showing long delay without allegation of facts sufficient to excuse is demurable, although nothing on the face of the complaint to show that defendant was prejudiced). See also Clanton v. Clanton, 52 Cal. App.2d 550, 126 P.2d 639 (1942); King v. Los Angeles County Fair Ass'n, 70 Cal. App.2d 592, 161 P.2d 468 (1945); Ferguson v. Edgar, 178 Cal. 17, 171 Pac. 1061 (1918). Compare Esan v. Briggs, 89 Cal. App.2d 427, 201 P.2d 25 (1948); Ulrich v. San Jacinto Estates, 109 Cal. App.2d 648, 241 P.2d 262 (1952).

69. E.g., McClelland v. Shaw, 23 Cal. App.2d 107, 72 P.2d 225 (1937); Long v. Long, 76 Cal. App.2d 716, 173 P.2d 840 (1946).

70. Cal. Code Civ. Proc. § 537 (1) and (2).

71. McCall v. Superior Court, supra, note 2; Filipan v. Television Mart, 105 Cal. App.2d 404, 233 P.2d 926 (1951).

72. See, e.g., 5 Cal. Jur.2d, Attachment and Garnishment § 24. Cf. Stowe v. Matson, 94 Cal. App.2d 678, 211 P.2d 591 (1949).

73. McCall v. Superior Court, supra, note 2.

74. The critical terms appearing in Cal. Code Civ. Proc. § 537, respecting joinder, are the same as those appearing in Cal. Code Civ. Proc. § 427, respecting attachment. Thus, the same distinctions between a quasi-contractual action premised on an out-of-court rescission and an equitable action to obtain a rescission must be drawn. Cf. McCall v. Superior Court, supra, note 2.

75. Cal. Code Civ. Proc. § 427 (1) as it presently stands is a typical code joinder provision. The trend toward an even wider permissive joinder of causes, so as to facilitate the expeditious resolution of all matters at issue between the parties is one of long standing (see, e.g., Ill. Rev. Stat. (1937) c 110 § 168; N.J. Comp. Stat. (2 Cum. Supp. 1911-1924) tit. 163 § 287, as amended, Laws, 1935, 339.) which received its greatest impetus upon the adoption of Rule 18 of the Federal Rules of Civil Procedure in 1938 which authorizes joinder of "as many claims either legal or equitable or both as...[a party] may have against an opposing party." This provision has since been adopted in a number of states. See, e.g., Rule 18, Rules of Civil Procedure for the Superior Courts of Arizona (Promulgated by the Supreme Court of Arizona, Effective January 1, 1956). Experience with the federal-type provision has been very satisfactory to the courts and the bar.

76. The superior court, pursuant to Art. VI § 5 of the Constitution, has residual original jurisdiction coverying all civil actions except those respecting which jurisdiction has been conferred by the Legislature on another court. None of the inferior courts have been given jurisdiction over rescission actions involving controverted sums exceeding $3,000.

77. Cal. Code Civ. Proc. § 89(a).

78. Cal. Code Civ. Proc. § 83.

79. Cal. Code Civ. Proc. § 112.

80. See Philpott v. Superior Court, supra, note 2; Jensen v. Harry H. Culver & Co., supra, note 31.

81. See, e.g., Comment, 21 Cal. L. Rev. 130 (1933); Comment, 23 Cal. L. Rev. 638 (1935).

82. See McCall v. Superior Court, supra, note 2; Comment, 36 Cal. L. Rev. 606, 617-19 (1948); Cf. Miller v. McLaglen, 82 Cal. App.2d 219, 186 P.2d 48 (1947). See generally, King, The Use of the Common Counts in California, 14 So. Cal. L. Rev. 288 (1941).

83. Proposed statutory changes are indicated in this report (1) by specifying code sections proposed to be repealed, (2) by setting out in full proposed new sections and (3) by setting out sections to be amended, indicating proposed additions by underlining and proposed deletions by striking over.

The author has not considered and expresses no opinion as to whether all of the proposed changes could be achieved in a single enactment or whether technical requirements respecting the subject matter of single law would necessitate more than one enactment in view of the diverse nature of the procedural provisions respecting which changes are suggested.

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March 5, 1958

Possible Changes in Statutes

Proposed by Professor Sullivan

Professor Sullivan sets forth at Pages 25 through 33 of his study suggested legislation together with comments thereon. His first proposal is to repeal Sections 3406 through 3408 of the Civil Code. However, Section 3407 may embody a substantive rule of law which should be retained in the new statute. It provides:

> Rescission cannot be adjudged for mere mistake, unless the party against whom it is adjudged can be restored to substantially the same position as if the contract had not been made.

I suggest the following changes in Section 1689 of the Civil Code as proposed by Professor Sullivan to be revised (changes from Professor Sullivan's proposed draft in strike-out and underline):

1689. The rescission of a contract may be adjudged, on application of a party aggrieved, in the following cases only:

1. If the consent of the party ~~rescinding~~ seeking to rescind, or of ~~any~~ party jointly contracting with him, was given by mistake, or obtained through duress, menace, fraud, or undue influence, exercised by or with the connivance of the party as to whom he ~~rescinds~~ seeks rescission, or of any other party to the contract jointly interested with such party;

2. If, through the fault of the party as to whom he ~~rescinds~~ seeks rescission, the cause for his obligation fails, in whole or in part;

****

5. ~~By consent of all the other parties.~~ If all of the parties to the contract have agreed to rescind it but a party has failed to execute the agreement;

****

I suggest the following changes in Section 1691 as drafted:

1. A party who ~~in a complaint, answer or cross complaint, or~~

~~by-way-of-reply,-as-provided-in-subparagraph-figure-4-of this-section~~ asserts a claim to have the rescission of a contract adjudged, shall not be denied relief, whether such relief would have formerly been denominated legal or equitable, because of a failure before judgment to restore or to offer to restore the benefits received under such contract, or to give notice of rescission to the other party.

2. ~~The-court-may-refuse-to-adjudge-a-rescission-of-the-contract.~~ Rescission of a contract shall be denied if the claim for rescission is not asserted promptly after the discovery of the facts which entitle the party to ~~have-a~~ seek rescission ~~adjudged~~ and if such lack of promptness has been prejudicial to the other party.

3. The court may ~~make-a-tender-by-the-rescinding-party-of restoration-of~~ require a party in whose favor a rescission is adjudged to restore the benefits received by him under a the contract rescinded as a condition of a judgment of rescission.

4. Where a release is pleaded in an answer to a claim asserted in a ~~complaint-or-cross-complaint,-or-is-introduced-as-a defense-to-a-claim-asserted-in-a-counterclaim~~ pleading, the party asserting the claim may serve and file a ~~reply~~ pleading stating a claim to have the rescission of the release adjudged. If such a ~~reply~~ pleading be served and filed ~~and-served,~~ the court shall determine separately, or shall require the jury to render separate verdicts upon the questions whether the rescission of the release should be adjudged and whether the party asserting the claim for which the release is given is otherwise entitled to judgment upon the claim if the party asserting the claim is found not to be entitled to rescission of the release, the release shall be accorded such effect as it may be entitled to as a defense to the claim. If the party asserting the claim is entitled to rescission of the release, such rescission ~~of-the-release~~ shall be adjudged, and the release shall be accorded no effect as a defense to the claim. Where the party asserting the claim recovers a judgment thereon, a separate judgment shall be entered in favor of the party who pleaded or introduced the release in the amount of the value of any benefits which were conferred by said party upon the party asserting the claim in exchange for the release.

I suggest the following changes in Section 1692 as drafted:

1692. Where a party in to an action ~~or-by-way-of-defense, counterclaim-or-reply~~ seeks to have the rescission of a contract adjudged, any party shall be entitled to a jury trial upon the issues so raised.

The Commission may wish to substitute for the revision of Section 338 of the Code of Civil Procedure by Professor Sullivan (p. 30) the following:

1. Add the following subparagraph 3 to C.C.P. Section 337:

> 3. An action to have the rescission of a written contract adjudged and to recover for benefits conferred pursuant to said contract, whether such relief would formerly have been denominated legal or equitable and whether the party seeking to have the rescission adjudged seeks specific restitution of the benefits conferred or their value. Where the ground for rescission is fraud or mistake, the cause of action to have a rescission adjudged shall not be deemed to have accrued until the aggrieved party discovered or should have discovered the facts constituting the fraud or mistake.

2. Add a similar subparagraph to C.C.P. Section 339, beginning as follows:

> 3. An action to have the rescission of a contract in writing adjudged and to recover, etc.

The Commission may wish to consider whether to add to the proposed statute a provision along the following lines:

The changes made by this bill shall not be applicable to or in any wise prejudice or affect any action pending on the effective date hereof in any of the courts of this State.

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1/6/58

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Dear John:

Thank you for your recent letter bringing me up to date on the action thus far taken in connection with my rescission study. I read with great interest the minutes of the September 19 meeting of the Northern Committee but delayed responding until I had time to comment at length.

As I view the problems involved in this topic, they are essentially procedural. Except for the minor (and inexplicable) differences in the grounds for rescission predicated by Section 1689 on the one hand and 3406 on the other, the same substantive requirements for rescission prevail whether the relief is sought by way of an out-of-court rescission and an action ("at law") to enforce the out-of-court rescission, or by way of a proceeding ("in equity") to obtain rescission. With minor exceptions, the same basic facts - for example, facts constituting fraud - would provide a basis for either mode of redress. Under either procedure, undue delay by the injured party will preclude relief. Under either procedure, the effect of the relief is to restore the status quo, the injured party giving back what he has received and recovering back that with which he parted or its value.

The only differences between the two modes of redress entail conditions upon obtaining relief - whether the aggrieved party must give notice of rescission and offer with precision to restore precisely what the other party is entitled to before commencing his action - and ancillary matters of a procedural character such as whether jury trial is available, whether attachment is available, what statute of limitations applies, and the like.

The principal conclusion of my study was that under a unified civil procedure in which law and equity are merged, there is neither a logical nor a pragmatic reason for retaining two separate modes for

obtaining rescissionary relief. The existing duality is nothing more than an anachronism resting entirely on the outmoded historical distinction between law and equity. Moreover, the existing duality is not merely a quaint but harmless reminder of the old English law tradition - it is productive of vast confusion, it results in like cases being decided differently depending upon which procedure is utilized, and it poses a constant threat that unjust results may be reached in individual cases merely because a lawyer or a judge was unable to make his way successfully through the procedural maze.

The primary question, therefore, - and one which it seems to me the Commission must first decide - is whether the dual procedures are to be retained, or whether a unified procedure is to be adopted. And in my view, this question admits only of one answer - that sound judicial administration necessitates an end to the existing duality.

Only after it has been determined that it is necessary to substitute a unified procedure for the existing dual procedure does it become pertinent to inquire how the particular procedural differences now prevailing should be resolved, i.e. whether, for example, to elect for the new procedure the statute of limitations now governing the "action at law" to enforce a rescission or the statute now governing the "proceeding in equity" to obtain a decree of rescission. And I would suggest that each of these subsidiary questions, including that upon which Mr. Stanton was focused - respecting whether a pre-trial notice and an offer to return what has been received should be a condition to relief - should be considered and passed upon separately, each upon its own merits.

In this connection, I would like to suggest that the "right" of an aggrieved party, which Mr. Stanton suggests should be preserved, to effect a unilateral out-of-court rescission is, realistically viewed, hardly a right at all, but merely an obligation to take a specified formal step - the sending of a formal notice of intent to rescind and a formal offer to return what has been received - as a prerequisite to bringing an "action at law" as distinguished from a "bill in equity" to procure rescissionary relief.

I agree entirely that the statute should not be changed so as to necessitate litigation where litigation is not now necessary. Thus, if the aggrieved party could persuade the other to participate in a mutual rescission, out of court, he should be free to do so. And under the changes I have recommended, he would continue to be free to attempt to do this, and to accomplish such a resolution if possible.

However, if the party in default does not agree to rescind, litigation is inevitably necessary if the aggrieved party is to have relief. His right to rescind, then, is but a right to sue - the same right he would have under the procedure which I have suggested. Indeed, his present right is a more humble one than that which the new procedure would afford since presently the right is conditioned upon his giving notice and offering before suit to restore the status quo. The concept of an "out-of-court rescission" developed initially as a fiction which

facilitated rescissionary relief in courts of law which felt incapable of entering conditional judgments. The plaintiff was afforded relief at law only if he first made an out-of-court tender; and the tender requirement was developed solely because the law courts felt incapable of entering an order in the action conditioning relief upon such a tender. Where, as under a unified civil action, any court may enter a conditional judgment, the distinction between the two types of actions is nothing but a relic.

Now it may be that there is an independent justification for requiring a notice and offer before an action is commenced, and, accordingly, that the new unified procedure should retain this requirement, making it applicable to all rescission actions. It has been argued, for example, that such a requirement reduces the likelihood that litigation will be necessary, inasmuch as the prospective defendant, seeing that the injured party is in earnest, may accept the offer, thus accomplishing a mutual out-of-court rescission.

This contention, I am personally persuaded, is little more than a specious rationalization. I think we may depend on self-interest to assure that rescinding plaintiffs will not resort to suit when their objectives could be accomplished without suit, just as we depend upon plaintiffs asserting all other kinds of claims to pursue settlement prospects on their own initiative. I don't see how we can assume the rescinding plaintiff is any more likely to sue without first exploring settlement prospects than is, for example, the plaintiff seeking compensatory damages for breach of contract.

In my view, therefore, little or no good is derived from the requirement of a formal notice and offer. On the other hand, justice may at times be frustrated by it, inasmuch as a party having a substantive claim to relief may artlessly fail adequately to comply with the requirement, and then, if he sues "at law", may be precluded from recovering by the technical defense.

It does not advance the argument, or serve to resolve the problem, to say that parties presently proceed on the assumption that they may rescind out of court. We would deprive an aggrieved party (and his attorney) of nothing other than a certain amount of confusion and anxiety if we told him he could procure judicial relief in a unified procedure without first giving a formal out-of-court notice of rescission and offer to restore. He can accomplish this now, if he is careful to frame his pleading in equitable terms and is willing to forego the procedural advantages of the "legal" mode of redress. Similarly, the change would work no hardship on the party defendant. In all likelihood he will be approached by the aggrieved party before suit, and will be afforded an opportunity to effect a mutual rescission. Indeed, the likelihood of settlement might be enhanced if the prospective defendant were approached informally, as he could be were formal notice not a prerequisite to relief, rather than by being greeted with the presently requisite formal notice of rescission and offer to restore which typically has all the earmarks of the initial step in a lawsuit and which may thus serve to render the prospective defendant's position more rigid. And even if under the new

procedure I have recommended the defendant were not approached before suit, he would still be free, after suit began, to tender back all that he had received (exactly as he would have to do were he willing to accept the formal notice of rescission which is now a prerequisite to suit) and thus to terminate the litigation at its inception.

The only thing of value of which the defendant would be deprived by the new procedure is something which, in justice, he ought not to have: that is, the opportunity to win his law suit, though substantively he is in the wrong, should the plaintiff's attorney stub his toe on the highly technical requirements respecting notice and offer to restore which now prevail.

My conclusion, then, is that the notice and offer to restore which are requisites for an "out-of-court rescission" and an action to enforce, are not conditions which ought to be carried over to the new procedure. I would re-emphasize, however, that a contrary conclusion would not vitiate the need for a new unified procedure. Even if it were to be concluded that the requirement of a pre-trial notice and offer to restore is a desirable one, this conclusion does not militate against the adoption of a single procedure. If it makes sense to require a formal notice of rescission and an offer to restore the status quo as a condition to rescissionary relief "at law", then it makes sense to require the same as a condition to rescissionary relief wholly regardless of the procedure chosen to obtain relief. Under present law, distinctions are drawn not on the basis of the nature of the underlying claim, but entirely upon the basis of the historic classification of the particular procedure chosen as a vehicle for asserting the claim. This is an anachronism which, to my mind, is utterly incapable of justification. Its sole consequence is confusion and differing results on like facts depending upon whether the claim for relief is cast in "equitable" or "legal" form.

Mr. Stanton also raises the question whether there would be a conflict between the amendments I have proposed and the Uniform Sales Act. I do not believe that there would be.

Section 69(d) of the Sales Act authorizes a buyer, upon a breach of warranty, among other remedies, to:

> "rescind the contract to sell or the sale and refuse to receive the goods or, if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid."

The thrust of this provision is substantive, not procedural. At common law there were conflicting decisions concerning whether a breach of warranty was a sufficiently material breach to warrant rescission as an alternative to an action for compensatory damages for breach (see Williston, Sales, Sec. 608a (Rev. Ed., 1958)). Section 69(d) makes it clear that rescission is available upon a breach of warranty.

Section 69(d) also has substantive implications in that it speaks of refusing to accept the goods or of offering to return them. This necessity - restoration of the status quo - has always been a substantive requisite to rescission whether at law or in equity. Section 69(d) simply reiterates this substantive requirement. It does not purport to suggest the procedural implementation - whether an offer to return must be made before suit, or whether it is sufficient that the judgment be made conditional on return or an offer to return.

The question I have been concerned with in my study is not the substantive question: whether rescission shall be conditioned on re-establishment of the status quo. I don't think it has ever been suggested by anyone that the aggrieved party ought to recover what he has given without returning or offering to return what he has received. The question upon which I have focused is whether the aggrieved party must make his offer, in formal and precise terms, before bringing his action, or whether it is sufficient that he make his offer as a concomitant of his law suit, and that the decree or judgment in his favor be conditioned upon a tender of whatever the court determines to be due.

Section 69(d), although not specifically, may also imply that the buyer must proceed in timely fashion. This, of course, is also part of the substantive law applicable to rescission, whether achieved in an action at law or in equity.

In sum, the legislative changes recommended in my study would not alter or conflict with the provisions of Section 69(d) of the Sales Act, but would simply make it clear that the offer necessitated by that section to return the goods would not be a procedural condition to the right to bring an action for rescission but only a substantive condition to the right, conferred by the section, to "recover the price or any part thereof which has been paid".

Section 65 of the Sales Act presents a somewhat more serious question. That section, dealing with the seller's remedy for breach of the sales contract, states that:

> "Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, the seller may totally rescind the contract or sale by giving notice of his election so to do to the buyer."

This section, on its face, may seem to make notice a substantive prerequisite to rescission by the seller for the buyer's breach, and, hence, to be affected by the amendments suggested by my study. In fact, however, the section is largely surplusage and is itself in conflict with other settled principles of the law of contract and sales. It does not make the substantive right of the seller to be free of his obligations under the contract dependent upon the giving of notice.

Section 65, it should be noted, is permissive in terms. It states that the seller, in given circumstances, "may" rescind upon giving notice. By implication, it would seem, a seller could not rescind in the designated situations without giving notice. However, the section deals only with cases "where the goods have not been delivered to the buyer" - that is, with situations where the injured party - the seller - if he wishes to treat the contract as being at an end, has no need to recover anything from the party in default - the buyer - because the status quo has not as yet been disturbed by a delivery of the goods to the buyer.

In situations to which Section 65 might be applicable, therefore, the seller, in addition to the "right to rescind", by giving notice, conferred by Section 65, has two alternatives, one of which is the equivalent of rescission and which is not conditioned upon notice.

First, the seller may stand on the contract, treating the buyer in default since the buyer has already "repudiated" or committed a "material breach", or "manifested his inability to perform". On this choice, the seller may sue for compensatory damages.

Secondly, and of significance here, if the seller does not think that he can prove compensatory damages, he may simply refuse to perform the contract without giving the buyer any notice whatsoever. If the buyer should then sue for breach, the seller has a complete defense in that the buyer -having "repudiated", or "manifested his inability to perform", or "committed a material breach" - has not fulfilled the implied conditions to his right to recover on the contract. See, Williston, Sales, §§467, et seq. (Rev. Ed., 1948); Williston, Contracts, §§814, et seq., Restatement, Contracts §§267, 274, 280, 395, 397 et seq. In substance, therefore, the seller's right, conferred by Section 65, to "rescind" by giving notice, is the precise equivalent of his right to refuse to proceed, even without giving notice, because of the buyer's failure to fulfill conditions to the seller's obligation. If the seller is sued, he still must defend. And if he can show "repudiation", or "material breach" by the buyer or that the buyer has manifested his "inability to perform", the defense is a complete one whether or not notice of rescission has been given.

I recognize that were the changes in the rescission provisions, which I recommended, to be adopted there would be a lack of synthesis between these provisions and Section 65, inasmuch as Section 65 does contemplate an out-of-court rescission accomplished by notice. Accordingly, should the changes I have recommended be accepted, the ideal solution might be to amend Section 65 by striking the phrase, "by giving notice of his election so to do to the buyer". I did not recommend this in my study, however, because I viewed Section 65 as an anomolous provision having no significant substantive effect even as the law now stands, and because I do not feel that the Sales Act - which is replete with anomolies and internal inconsistencies such as that implicit in Section 65 - should be dealt with piecemeal, particularly inasmuch as it has been the subject of extensive study in connection with the proposed Uniform Commercial Code recently adopted in Pennsylvania and Massachusetts.

I hope that these observations may be of aid to you and to the Commission, and I will be most interested to learn what action is finally taken. Should it seem expedient, I would be pleased, of course, to make the minor revisions in my study which you suggested earlier. Quite frankly, however, I feel that there is little further than I can do, either to clarify the issues, or by way of expressing my own views upon them, which would be of material aid to the Commission in considering and passing upon the study topic involved.

The most important question, as I have indicated, would seem to be whether the present dual rescission procedure is useful or meaningful. It seems quite clear to me that it is not, and that a single rescission procedure should be substituted.

The subsidiary questions involve separate determinations, with respect to each of the procedural distinctions now prevailing, as to which alternative - that now governing actions to enforce a rescission, or that now governing actions to obtain a rescission - should be carried over to the new unitary rescission procedure. In my study, I have expressed my view with respect to each of these subsidiary questions, and the reasons for the views I have taken.

I look forward to hearing from you about whether there is anything further that I can do.

Sincerely,

/s/ Larry

Lawrence A. Sullivan

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