

STATE OF CALIFORNIA

CALIFORNIA LAW REVISION COMMISSION

RECOMMENDATION AND STUDY

relating to

Rescission of Contracts

October 1960

LETTER OF TRANSMITTAL

To HIS EXCELLENCY EDMUND G. BROWN
Governor of California
and to the Members of the Legislature

The California Law Revision Commission was authorized by Resolution Chapter 42 of the Statutes of 1956 to make a study to determine whether the provisions of the Civil Code relating to rescission of contracts should be revised to provide a single procedure for rescinding contracts and achieving the return of the consideration given. The Commission submits herewith its recommendation relating to this subject and the study prepared by its research consultant, Lawrence A. Sullivan, former Acting Associate Professor of the School of Law, University of California at Berkeley.

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RECOMMENDATION OF THE CALIFORNIA LAW REVISION COMMISSION

Relating to Rescission of Contracts

The Civil Code provides two distinct methods by which a person who has the right to rescind a contract may obtain rescissionary relief:

(1) Sections 1688 through 1691 provide for out-of-court rescission. These sections set forth the grounds and the method by which a person may rescind a contract by his own act. After an out-of-court rescission, either party may bring an action to enforce his rights arising out of the out-of-court rescission.

(2) Sections 3406 through 3408 provide for an action for rescission. These sections set forth the grounds and conditions upon which a person may obtain the specific judicial relief of rescission. Any further relief that is needed is usually given as a part of the judgment granting rescission.

An out-of-court rescission is accomplished by giving the other party to the contract notice of rescission and by offering to restore the consideration if any has been received. An action to enforce the out-of-court rescission and to recover the consideration given is deemed to be an action at law upon the promise to restore the consideration that arises by implication when the contract is rescinded. Because the action is to enforce this implied promise, the statute of limitations begins to run on the date of the notice of rescission. Because the promise is implied and not written, the two-year statute of limitations applicable to actions on unwritten contracts applies even though both the principal contract and the rescission notice are in writing. Because the action is deemed to be a "legal" contract action, there is a right to a jury trial, the action may be brought in a justice court in appropriate cases, the common counts may be used in pleading, the cause of action may be joined with other unrelated contractual causes of action and the property of the defendant may be attached to secure the claim for relief. Despite the fact that an action to enforce an out-of-court rescission is deemed a "legal" action, incidental equitable relief, such as the cancellation of an instrument, is sometimes granted in such an action.

Unlike an action to enforce an out-of-court rescission, an action for judicial rescission is considered an action in "equity." The same grounds that the code provides for a unilateral out-of-court rescission are also grounds for the judicial relief of rescission; however, a judicial decree of rescission may be obtained on two additional grounds: where the contract is illegal and the parties are not equally in fault, and where the continuance of the contract would prejudice the public interest. Because a decree of rescission is based upon the theory that specific relief is being given for the wrong that gave rise to the right of rescission, the statute of limitations begins to run from the date the act

occurred that gave the plaintiff the right to rescind. The length of the limitation period depends upon the nature of the wrong. If rescission is sought for fraud or mistake, the three-year limitation (from discovery thereof) is applicable. If rescission is for material breach of a written contract, presumably the four-year statute applies. Because no implied promise to restore consideration arises until a contract is actually rescinded, the action to obtain a rescission decree is not regarded as an action to enforce a promise and the provisional remedy of attachment may not be utilized. For the same reason, a cause of action for rescission may not be joined with other unrelated contract causes of action. Because the action is in "equity," there is no right to a jury trial, the justice court does not have jurisdiction and the common counts may not be used in pleading. Nevertheless, the action to obtain a decree of rescission may be used even though the only substantive relief a party wants is a return of the consideration given—a money judgment.

The California courts have frequently failed to distinguish clearly between the action to enforce an out-of-court rescission and the action to obtain the specific relief of rescission. For example, although there is no statutory requirement that a notice of rescission be sent as a condition precedent to the action for rescission, the courts have implied such a requirement from the fact that such a notice is necessary to accomplish an out-of-court rescission. Despite the fact that the action for rescission is in equity and the doctrine of laches should be applicable, the courts have denied relief for failure to send the notice of rescission promptly regardless of whether such failure has caused any prejudice to the other party.

The existence of these two procedures for obtaining the same type of relief permits a plaintiff to affect seriously the rights of the parties merely by the way he drafts his complaint. The period of the statute of limitations, the date of its commencement, the forum of the trial and the right to a jury may all be controlled by the form of the complaint. At times, relief may be denied a plaintiff with a meritorious cause of action merely because the wrong form of action is pleaded.

The Law Revision Commission believes that the rights of the parties should not be dependent on the form of the complaint. These rights should be dependent upon the nature of the wrong complained of and the substantive relief requested. The Commission also believes that the law relating to rescission is unnecessarily complex and confusing to both courts and attorneys, to say nothing of laymen. Since the duality in the procedures for obtaining rescissionary relief has given rise to this situation, the Commission believes the problems may be solved by eliminating this duality and providing a single, simple procedure to be followed in all situations where rescissionary relief is sought.

Accordingly the Law Revision Commission recommends:

1. The provisions in the Civil Code providing for rescission by judicial decree should be repealed. The Commission has concluded that the judicial rescission procedure should be repealed rather than the out-of-court rescission procedure, for in many instances the time of giving the notice which effects the out-of-court rescission has a substantial effect on the rights of the parties. Under the Uniform Sales Act, for example, the notice operates at times to shift the title to property, thus

shifting the risk of loss in some cases and determining whether or not a seller is an unsecured creditor of a bankrupt buyer in others. Because it is important to retain these aspects of rescission, the Commission has concluded that judicial rescission should be abolished.

2. The code provisions setting forth the out-of-court rescission procedure should be amended to include the two additional grounds for rescission that now appear only in the article pertaining to judicial rescission so that the grounds upon which a contract may be rescinded will remain unchanged.*

3. The notice and offer-to-restore requirement that is contained in the existing statutes on out-of-court rescission should be amended to provide that the service of a pleading requesting rescissionary relief shall be deemed to be the required notice and offer if none has been given previously. Whether or not the service of such a pleading would comply with the requirement that the notice and offer be given promptly would have to be determined from the facts in each situation. It should be noted that, under the statute recommended by the Commission, the service of a pleading seeking rescissionary relief may constitute an offer to restore consideration which may be accepted by the other party whether or not the serving party so intends.

4. The notice and offer-to-restore requirement should also be amended to provide that relief may not be denied for failure to give the required notice and offer promptly unless such failure has substantially prejudiced the other party. Thus, a party with a meritorious claim will not be denied relief for failure to comply with a technical requirement when the failure has not amounted to a waiver of the right to rescind and has not caused any prejudice to the other party. The Commission does not believe that an innocent party's right to rescissionary relief should be lost by a bare failure to notify the defendant promptly.

5. The rescission statutes should make plain that, after rescinding a contract, a party may seek any form of relief warranted under the circumstances, whether legal or equitable. As all such actions will be to *enforce* a rescission, the right of the parties to a jury and the court in which the action must be brought will be determined by the nature of the substantive relief requested and not by the form of the complaint. For example, if a bare money judgment is sought, a justice court will have jurisdiction in appropriate cases, and the plaintiff may not convert the action into an equity action and thus deprive the justice court of jurisdiction merely by a prayer for rescission. The statute should also make plain that the court may grant any other relief that is appropriate under the circumstances if it develops at the trial that the plaintiff has mistaken his remedy and the purported rescission was not effective.

6. To dispel any doubt concerning the scope of relief that may be given in the action to enforce rescission, the statute should also indicate that the court may award consequential damages as well as a restora-

* This recommendation is concerned only with the procedure for effecting and enforcing rescission and not with the grounds upon which a contract may be rescinded. Accordingly, the Commission has not considered the possible elimination or revision of existing grounds for rescission or the addition of new ones.

tion of any consideration that has been given. The court should also be given the specific authority to render a conditional judgment in appropriate cases or otherwise adjust the equities between the parties.

7. The statutes limiting the time within which actions must be brought should be amended to provide a four-year limitation on actions to enforce the rescission of a written contract and a two-year limitation on actions to enforce the rescission of an unwritten contract. The limitation periods for enforcing rescission should correspond to the limitation periods for enforcing the contracts themselves so that a person's right to rescind will not be lost before the other party loses his right to enforce the contract. The period of limitation should begin when the cause for rescission occurs—or, in the case of fraud or mistake, when it is discovered—and not when the notice of rescission is given; for a party should not be able to control the commencement of the limitation period by his own act or failure to act.

8. The provisions of the Code of Civil Procedure relating to joinder and attachment should be amended so that it is certain that an action to enforce rescission will be considered like any other contract action for these purposes.

9. A statute should be enacted to deal with the problems created by the rescission of a release. The California courts have permitted a plaintiff who has been fraudulently induced to execute a release to rescind the release even though the plaintiff does not restore the consideration he received for executing the release. The courts have permitted such a plaintiff to sue on the underlying cause of action and have the consideration received for the release offset against the judgment recovered against the defendant. This procedure may be quite unfair to a defendant if the plaintiff does not recover a judgment as large as the consideration he received or if the plaintiff fails to establish any cause of action. In such cases, the defendant has been deprived of the benefit of his bargain without a restoration of the payment made. Therefore, the Commission believes that a statute should be enacted providing that, if a release is pleaded and the plaintiff asserts that it is invalid or subject to rescission for any reason, the validity of the release shall first be determined. If the release is found to be invalid or to have been rescinded, the court shall set off the consideration received by the plaintiff for the release against any judgment that he may recover, and if the consideration received by the plaintiff exceeds any judgment recovered, the court shall enter judgment against him for the excess.

The Commission's recommendations would be effectuated by the enactment of the following measures: *

* Matter in italics would be added to the present law; matter in "strikeout" type would be omitted from the present law.

I

An act to repeal Article 5 (commencing with Section 3406) of Chapter 2 of Title III of Part 1 of Division Fourth of, to amend Sections 1689 and 1691 of, and to add Sections 1692 and 1693 to, the Civil Code, and to amend Sections 337, 339, 427 and 537 of the Code of Civil Procedure, relating to rescission of contracts.

The people of the State of California do enact as follows:

SECTION 1. Section 1689 of the Civil Code is amended to read:

1689. (a) *A contract may be rescinded if all the parties thereto consent.*

(b) *A party to a contract may rescind the same contract 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 the obligation of the rescinding party fails, in whole or in part, through the fault of the party as to whom he rescinds ;.*

(3) *If such the consideration for the obligation of the rescinding party becomes entirely void from any cause ;.*

(4) *If such the consideration for the obligation of the rescinding party, before it is rendered to him, fails in a material respect ; from any cause ;.*

(5) *By consent of all the other parties; or If the contract is unlawful for causes which do not appear in its terms or conditions, and the parties are not equally at fault.*

(6) *If the public interest will be prejudiced by permitting the contract to stand.*

(7) *Under the circumstances provided for in Sections 39, 1533, 1566, 1785 and , 1789 , 1930 and 2314 of this code , Section 2470 of the Corporations Code, Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code or any other statute providing for rescission.*

Sec. 2. Section 1691 of the Civil Code is amended to read:

1691. ~~Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules: Subject to Section 1693, to effect a rescission a party to the contract must, 1. He must rescind promptly; upon discovering the facts which entitle him to rescind; if he is free from duress, menace, undue influence; or disability; and is aware of his right to rescind ; and; :~~

(a) *Give notice of rescission to the party as to whom he rescinds; and*

2. (b) ~~He must~~ *Restore to the other party everything of value which he has received from him under the contract ; or must offer to*

restore the same; upon condition that ~~such~~ *the other party shall* do likewise, unless the latter is unable or positively refuses to do so.

When notice of rescission has not otherwise been given or an offer to restore the benefits received under the contract has not otherwise been made, the service of a pleading in an action or proceeding that seeks relief based on rescission shall be deemed to be such notice or offer or both.

SEC. 3. Section 1692 is added to the Civil Code, to read:

1692. When a contract has been rescinded in whole or in part, any party to the contract may seek relief based upon such rescission by (a) bringing an action to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission or for any other relief to which he may be entitled under the circumstances or (b) asserting such rescission by way of defense, counterclaim or cross-complaint.

If in an action or proceeding a party seeks relief based upon rescission and the court determines that the contract has not been rescinded, the court may grant any party to the action any other relief to which he may be entitled under the circumstances.

A claim for damages is not inconsistent with a claim for relief based upon rescission. The aggrieved party shall be awarded complete relief, including restitution of benefits, if any, conferred by him as a result of the transaction and any consequential damages to which he is entitled; but such relief shall not include duplicate or inconsistent items of recovery.

If in an action or proceeding a party seeks relief based upon rescission, the court may require the party to whom such relief is granted to make any compensation to the other which justice may require and may otherwise in its judgment adjust the equities between the parties.

SEC. 4. Section 1693 is added to the Civil Code, to read:

1693. When relief based upon rescission is claimed in an action or proceeding, such relief shall not be denied because of delay in giving notice of rescission unless such delay has been substantially prejudicial to the other party.

A party who has received benefits by reason of a contract that is subject to rescission and who in an action or proceeding seeks relief based upon rescission shall not be denied relief because of a delay in restoring or in tendering restoration of such benefits before judgment unless such delay has been substantially prejudicial to the other party; but the court may make a tender of restoration a condition of its judgment.

SEC. 5. Article 5 (commencing with Section 3406) of Chapter 2 of Title III of Part 1 of Division Fourth of the Civil Code is repealed.

SEC. 6. Section 337 of the Code of Civil Procedure is amended to read:

337. Within four years: 1. An action upon any contract, obligation or liability founded upon an instrument in writing, except as provided in Section 336a of this code; provided, that the time within which any action for a money judgment for the balance due upon an obligation for the payment of which a deed of trust or mortgage with power of sale upon real property or any interest therein was given as security,

following the exercise of the power of sale in such deed of trust or mortgage, may be brought shall not extend beyond three months after the time of sale under such deed of trust or mortgage.

2. An action to recover (1) upon a book account whether consisting of one or more entries; (2) upon an account stated based upon an account in writing, but the acknowledgment of the account stated need not be in writing; (3) a balance due upon a mutual, open and current account, the items of which are in writing; provided, however, that where an account stated is based upon an account of one item, the time shall begin to run from the date of said item, and where an account stated is based upon an account of more than one item, the time shall begin to run from the date of the last item.

3. *An action based upon the rescission of a contract in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake.*

SEC. 7. Section 339 of the Code of Civil Procedure is amended to read:

339. Within two years: 1. An action upon a contract, obligation or liability not founded upon an instrument of writing, other than that mentioned in subdivision two of Section ~~three hundred thirty seven~~ 337 of this code; or an action founded upon a contract, obligation or liability, evidenced by a certificate, or abstract or guaranty of title of real property, or by a policy of title insurance; provided, that the cause of action upon a contract, obligation or liability evidenced by a certificate, or abstract or guaranty of title of real property or policy of title insurance shall not be deemed to have accrued until the discovery of the loss or damage suffered by the aggrieved party thereunder.

2. An action against a sheriff, coroner, or constable upon a liability incurred by the doing of an act in his official capacity and in virtue of his office, or by the omission of an official duty including the nonpayment of money collected upon an execution. But this subdivision does not apply to an action for an escape.

3. *An action based upon the rescission of a contract not in writing. The time begins to run from the date upon which the facts that entitle the aggrieved party to rescind occurred. Where the ground for rescission is fraud or mistake, the time does not begin to run until the discovery by the aggrieved party of the facts constituting the fraud or mistake.*

SEC. 8. Section 427 of the Code of Civil Procedure is amended to read:

427. The plaintiff may unite several causes of action in the same complaint, where they all arise out of:

1. Contracts, express or implied. *An action brought pursuant to Section 1692 of the Civil Code shall be deemed to be an action upon an implied contract within the meaning of that term as used in this section.*

2. Claims to recover specific real property, with or without damages for the withholding thereof, or for waste committed thereon, and the rents and profits of the same.

3. Claims to recover specific personal property, with or without damages for the withholding thereof †.

4. Claims against a trustee by virtue of a contract or by operation of law †.

5. Injuries to character †.

6. Injuries to person †.

7. Injuries to property †.

8. Claims arising out of the same transaction, or transactions connected with the same subject of action, and not included within one of the foregoing subdivisions of this section.

9. Any and all claims for injuries arising out of a conspiracy, whether of the same or of different character, or done at the same or different times.

The causes of action so united must all belong to one only of these classes except as provided in cases of conspiracy, and must affect all the parties to the action, and not require different places of trial, and must be separately stated; but an action for malicious arrest and prosecution, or either of them, may be united with an action for either an injury to character or to the person; provided, however, that in any action brought by the husband and wife, to recover damages caused by any injury to the wife, all consequential damages suffered or sustained by the husband alone, including loss of the services of his said wife, moneys expended and indebtedness incurred by reason of such injury to his said wife, may be alleged and recovered without separately stating such cause of action arising out of such consequential damages suffered or sustained by the husband; provided, further, that causes of action for injuries to person and injuries to property, growing out of the same tort, may be joined in the same complaint, and it is not required that they be stated separately.

SEC. 9. Section 537 of the Code of Civil Procedure is amended to read:

537. The plaintiff, at the time of issuing the summons, or at any time afterward, may have the property of the defendant attached, as security for the satisfaction of any judgment that may be recovered, unless the defendant gives security to pay such judgment, as in this chapter provided, in the following cases:

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, shall be deemed to be an action upon an implied contract within the term as used throughout all subdivisions of this section. *An action brought pursuant to Section 1692 of the Civil Code shall be deemed to be an action upon an implied contract within the meaning of that term as used in this section.*

2. In an action upon a contract, express or implied, against a defendant not residing in this State, or who has departed from the State, or who cannot after due diligence be found within the State, or who conceals himself to avoid service of summons.

3. In an action against a defendant, not residing in this State, or who has departed from the State, or who cannot after due diligence be found within the State, or who conceals himself to avoid service of summons, to recover a sum of money as damages, arising from an injury to person or property in this State, in consequence of negligence, fraud, or other wrongful act.

4. In an action in unlawful detainer where it appears from the verified complaint on file therein that rent is actually due and payable from the defendant to the plaintiff for the premises sought to be recovered in said action; provided, the payment of such rent is not secured by any mortgage or lien upon real or personal property, or 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.

5. In an action by the State of California or any political subdivision thereof, for the collection of taxes due said State or political subdivision, or for the collection of any moneys due upon any obligation or penalty imposed by law.

II

An act to add Section 598 to the Code of Civil Procedure, relating to releases.

The people of the State of California do enact as follows:

SECTION 1. Section 598 is added to the Code of Civil Procedure, to read:

598. Where a release is pleaded as a defense to a cause of action, it shall first be determined whether the release is valid and constitutes a defense to the cause of action and whether it has been rescinded pursuant to the provisions of Chapter 2 (commencing with Section 1688) of Title 5 of Part 2 of Division 3 of the Civil Code. If the release is held to be valid and not rescinded, it shall be accorded the effect to which it is entitled as a defense to the cause of action. If the release is found to be invalid or to have been rescinded, the release shall be accorded no effect as a defense to the cause of action; but the court shall:

(a) If the party asserting the cause of action recovers a judgment thereon, set off against the judgment rendered in favor of the party asserting the cause of action the amount or value of any benefits that were conferred upon such party in exchange for the release by the party who pleaded the release except to the extent that such benefits may have been restored, and if such amount exceeds the judgment rendered in favor of the party asserting the cause of action, the court shall enter judgment in favor of the party who pleaded the release in the amount of such excess.

(b) If the party asserting the cause of action does not recover a judgment thereon, enter judgment in favor of the party who pleaded the release in the amount or value of the benefits that were conferred by such party in exchange for the release except to the extent that such benefits may have been restored.

A STUDY RELATING TO RESCISSION OF CONTRACTS *

INTRODUCTION

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 the basis and origin 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, to describe briefly 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.

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 Sections 1689 and 1691. Section 1689 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 Section 1691 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

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

¹ It is essential to recognize that rescission is a commodious remedy available to redress various wrongs each of which, generically, is sharply distinguishable 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 knowingly 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.

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 regains both possession of and title to the things with which he had parted and all liabilities under the contract are 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 value³ 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 ejectment⁵ 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 Section 3406, which provides that rescission may be adjudged not only on any of the grounds which under Section 1689 would provide a basis for an out-of-court rescission but also 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 document⁹ or may establish a constructive trust.¹⁰

HISTORICAL BACKGROUND FOR DUAL RESCISSION PROCEDURES

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 illus-

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

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.* CAL. CIV. CODE § 3412.

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

trated 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 seventeenth and eighteenth centuries, were not, in the common law courts, grounds for setting aside otherwise enforceable contractual commitments—such as 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, 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 over-all expansion of legal remedies during the seventeenth and eighteenth 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 would, however, 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 seems to have been decided in the last decade of the seventeenth 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

¹¹ At the request of the Law Revision 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* 67-88 (1926).

¹³ 5 *HOLDSWORTH, HISTORY OF ENGLISH LAW* 292, 326, 328 (1924).

¹⁴ See *McCLINTOCK, EQUITY* § 25, p. 55 (2d ed. 1943); 1 *POMEROY, EQUITY JURISPRUDENCE* § 115 (5th ed. 1941).

¹⁵ *Astley v. Reynolds*, 2 Str. 915, 93 Eng. Rep. 939 (K.B. 1781); *Attorney General v. Perry*, 2 Comyns Rep. 482, 92 Eng. Rep. 1169 (K.B. 1732); *Hogan v. Shee*, 2 Esp. 522, 170 Eng. Rep. 441 (K.B. 1797). See generally *JACKSON, HISTORY OF QUASI-CONTRACT* §§ 18, 21, 22(3) (1936).

¹⁶ *Tomkins v. Bernet*, 1 Salk. 22, 91 Eng. Rep. 21 (K.B. 1693). See 8 *HOLDSWORTH, op. cit. supra* note 12, at 94; *JACKSON, op. cit. supra* note 15, at 74.

¹⁷ *E.g.*, *Bonnel v. Foulke*, 2 Sid. 4, 82 Eng. Rep. 1224 (K.B. 1657). See *JACKSON, op. cit. supra* note 15, at 58.

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 consistency, 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 nineteenth 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 eighteenth 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 essentially 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 that was achieved in equity.

Background of California Code Provisions

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.

¹⁸ *E.g.*, *Cary v. Hotelling*, 1 Hill 311 (Sup. Ct. 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.*, 153 Cal. 411, 95 Pac. 1029 (1908).

¹⁹ *E.g.*, *Edmeads v. Newman*, 1 B. & C. 418, 107 Eng. Rep. 155 (K.B. 1823). Compare *Clarke v. Dickson*, E.B. & E. 148, 120 Eng. Rep. 463 (Q.B. 1853) (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 CALIF. L. REV. 185 (1922).

Since 1872, the rescission provisions have been amended only twice. In 1931, a change was made in Section 1689 which was 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 *in toto* as grounds for an action to obtain a rescission those 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.

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.

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

²¹ Cal. Stat. 1931, ch. 1070, § 1689, p. 2260.

²² Cal. Stat. 1953, ch. 588, § 3406, p. 1835.

²³ See *Smith v. Bromley*, 2 Doug. 696, 99 Eng. Rep. 441 (K.B. 1760); *Clarke v. Shee*, 1 Cowp. 197, 98 Eng. Rep. 1041 (K.B. 1774); Wade, *Restitution of Benefits Acquired Through Illegal Transactions*, 95 PA. L. REV. 261 (1947).

²⁴ CAL. CONST. art. I, § 7.

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. 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 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 trial 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 trial although equitable relief is essential.

If Section 3406 of the Civil 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 exist, 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

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 a jury trial must still be approached in the context of 1850 common law pleading." See also *Philpott v. Superior Court*, 1 Cal.2d 512, 36 P.2d 635 (1934); *Ito v. Watanabe*, 213 Cal. 487, 2 P.2d 799 (1931).

²⁶ *Bank of America v. Greenbach*, 98 Cal. App.2d 220, 219 P.2d 814 (1950); cf. *Ito v. Watanabe*, 213 Cal. 487, 2 P.2d 799 (1931); *Lawrence v. Ducommun*, 14 Cal. App.2d 396, 58 P.2d 407 (1936).

²⁷ *Davis v. Security-First Nat. Bank*, 1 Cal.2d 541, 36 P.2d 649 (1934); *Ito v. Watanabe*, 213 Cal. 487, 2 P.2d 799 (1931).

²⁸ E.g., *Rocha v. Rocha*, 197 Cal. 396, 240 Pac. 1010 (1925).

²⁹ E.g., *Davis v. Security-First Nat. Bank*, 1 Cal.2d 541, 36 P.2d 649 (1934).

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 to enforce a rescission. In *Fairbairn v. Eaton*,³⁰ for example, 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; for the instrument afforded 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.

The *Fairbairn* case, 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

³⁰ 6 Cal. App.2d 264, 43 P.2d 1113 (1935).

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); *Jensen v. Harry H. Culver & Co.*, 127 Cal. App. Supp. 783, 15 P.2d 907 (1932); *Ingalls v. Superior Court*, 121 Cal. App. 453, 9 P.2d 266 (1932); *Freligh v. McGrew*, 95 Cal. App. 251, 272 Pac. 791 (1928), all of which suggest the unrestricted availability of the action to obtain a rescission.

³² *E.g.*, 1 WITKIN, CALIFORNIA PROCEDURE, *Actions* § 29, p. 519 (1954); Koford, *Rescission at Law and in Equity*, 36 CALIF. L. REV. 606 (1948).

(*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

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 & Son*, 151 Tenn. 630, 271 S.W. 41 (1924); Annot., *Rescission Suit—Proper Forum*, 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*, *Equity* § 50, p. 117 (2d ed. 1948).

³⁴ For example, in *Fearey 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 ancillary 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.*, *Rocha v. Rocha*, 197 Cal. 396, 240 Pac. 1010 (1925); *Matteson v. Wagoner*, 147 Cal. 739, 82 Pac. 436 (1905). 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 a period that an offer of restoration is a condition to an action to obtain a rescission as well as to an action to enforce a rescission. See note 62, *infra*, and text thereto. Thus, in *Kelley v. Owens*, 120 Cal. 502, 510, 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*, 133 Cal. 489, 494, 65 Pac. 1044, 1046 (1901), 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*, 133 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.

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 There 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.

Time Within Which 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

³⁶ 1 Cal.2d 527, 36 P.2d 642 (1934).

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.³⁷ 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.³⁸ 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.³⁹ 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 of the Civil Code 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.⁴⁰ Yet, this will not be true as a matter of course. Pursuant to Section 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 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 which 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.⁴¹ 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

³⁷ 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, CALIFORNIA PROCEDURE, *Actions* §§ 112-128, pp. 614-636 (1954).

³⁸ CAL. CODE CIV. PROC. § 338(4); *Redpath v. Aagaard*, 217 Cal. 63, 16 P.2d 998 (1932).

³⁹ *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 (1896); *Rossi v. Jedlick*, 115 Cal.App. 230, 1 P.2d 1065 (1931) (failure of consideration due to supervening illegality); *Taback v. Greenberg*, 108 Cal.App. 759, 292 Pac. 279 (1930) (fraud).

⁴⁰ See 1 WITKIN, CALIFORNIA PROCEDURE, *Actions* § 141, p. 650 (1954).

⁴¹ *Toomey v. Toomey*, 13 Cal.2d 317, 89 P.2d 634 (1939); *Redpath v. Aagaard*, 217 Cal. 63, 16 P.2d 998 (1932); *Zakaessian v. Zakaessian*, 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 may apply. CAL. CODE CIV. PROC. § 318. *Murphy v. Crowley*, 140 Cal. 141, 73 Pac. 820 (1903).

action upon a contract governed by the four-year period provided in Section 337 of the Code of Civil Procedure, if in writing, or the two-year period established by Section 339(1) of the Code of Civil Procedure, if not in writing.⁴² 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).⁴³

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 limitation periods 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 regardless of whether the defendant is seriously prejudiced by it.⁴⁴ The provisions of Sections 3406 to 3408 of the Civil Code 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 tradition⁴⁵—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

⁴² The fact that the contract provisions are generally applied regardless of the type of relief sought 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 latter alternative would be adopted. See 1 WITKIN, CALIFORNIA PROCEDURE, *Actions* § 114, p. 617 (1954).

⁴³ *Thomas v. Pacific Beach Co.*, 115 Cal. 136, 46 Pac. 899 (1896); *cf. Rossi v. Jedlick*, 115 Cal. App. 230, 1 P.2d 1065 (1931); *Taback v. Greenberg*, 108 Cal. App. 759, 292 Pac. 279 (1930).

⁴⁴ *Estrada v. Alvarez*, 38 Cal.2d 386, 240 P.2d 273 (1952) (complaint showing long delay without allegation of facts sufficient to excuse is demurrable, although nothing on the face of the complaint to show that defendant was prejudiced). See also *Ferguson v. Edgar*, 178 Cal. 17, 171 Pac. 1061 (1918); *King v. Los Angeles County Fair Ass'n*, 70 Cal. App.2d 592, 161 P.2d 468 (1945); *Clanton v. Clanton*, 52 Cal. App.2d 550, 126 P.2d 639 (1942). Compare *Ulrich v. San Jacinto Estates*, 109 Cal. App.2d 648, 241 P.2d 262 (1952); *Esau v. Briggs*, 89 Cal. App.2d 427, 201 P.2d 25 (1948).

⁴⁵ *E.g.*, *Long v. Long*, 76 Cal. App.2d 716, 173 P.2d 840 (1946); *McClelland v. Shaw*, 23 Cal. App.2d 107, 72 P.2d 225 (1937).

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 eliminated.

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 second 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.

Availability of Provisional Remedy of Attachment

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.⁴⁶ 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.⁴⁷

⁴⁶ CAL. CODE CIV. PROC. § 537(1), and see *id.* § 537(2).

⁴⁷ *Fillipan v. Television Mart*, 105 Cal. App.2d 404, 233 P.2d 926 (1951); *McCall v. Superior Court*, 1 Cal.2d 527, 36 P.2d 642 (1934).

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.⁴⁸ 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.⁴⁹ Accordingly, a plaintiff could complete an out-of-court rescission and bring his action on the theory that he acquired 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, is sought and where either the defendant is absent or the claimant has no security available to him.

Joinder of Other Claims

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.⁵⁰

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

⁴⁸ See, e.g., 5 CAL. JUR.2d *Attachment and Garnishment* § 24 (1952). Cf. *Stowe v. Matson*, 94 Cal. App.2d 678, 211 P.2d 591 (1949).

⁴⁹ *McCall v. Superior Court*, 1 Cal.2d 527, 36 P.2d 642 (1934).

⁵⁰ The critical terms appearing in Code of Civil Procedure Section 427, respecting joinder, are the same as those appearing in Section 537 of the Code of Civil Procedure, 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*, 1 Cal.2d 527, 36 P.2d 642 (1934).

matters at issue between the parties,⁵¹ 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.

Jurisdiction of Trial Courts

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 \$3,000.⁵² Municipal courts have jurisdiction over all rescission actions involving an amount in controversy not in excess of \$3,000.⁵³ Justice courts have jurisdiction concurrent with the municipal courts⁵⁴ over all actions to enforce a rescission, other than those involving title to real property, where the amount in controversy does not exceed \$500.⁵⁵ 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.⁵⁶ This distinction was a recurrent source of confusion, litigation and critical comment.⁵⁷ 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

⁵¹ Section 427(1) of the Code of Civil Procedure 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. ANN. STAT. ch. 110, § 44 (1956); N.J. RULES 4:31-1) 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., ARIZ. SUPER. CT. RULE 18(a). Experience with the federal-type provision has been very satisfactory to the courts and the bar.

⁵² The superior court, pursuant to Article VI, Section 5 of the Constitution, has residual original jurisdiction covering 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.

⁵³ CAL. CODE CIV. PROC. § 89 (a).

⁵⁴ CAL. CODE CIV. PROC. § 83.

⁵⁵ CAL. CODE CIV. PROC. § 112.

⁵⁶ See *Philpott v. Superior Court*, 1 Cal.2d 512, 36 P.2d 635 (1934); *Jensen v. Harry H. Culver & Co.*, 127 Cal. App. Supp. 783, 15 P.2d 907 (1932).

⁵⁷ See, e.g., Comment, 23 CALIF. L. REV. 638 (1935); Comment, 21 CALIF. L. REV. 130 (1933).

law, it would seem appropriate to confer jurisdiction in rescission actions under a unitary procedure only upon the superior courts and the municipal courts.

Use of 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.⁵⁸ 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 Section 426, with respect to complaints generally. This change would seem to be a salutary one.

REQUIREMENT OF OFFER TO RESTORE BENEFITS RECEIVED

Another vital issue upon which a person's right to obtain rescissionary relief may turn is whether notice of rescission and an offer by plaintiff to restore the consideration received by him under the contract is a condition precedent of 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.⁵⁹ 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.⁶⁰ 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.⁶¹ However, in California, despite the existence of some major exceptions to the rule, it seems to be settled that a pre-action notice of rescission and an offer of restoration is a condition to both the action to obtain a rescission and the action to enforce an out-of-court rescission.⁶²

⁵⁸ See *McCall v. Superior Court*, 1 Cal.2d 527, 36 P.2d 642 (1934); Comment, 36 CALIF. 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).

⁵⁹ E.g., *Gould v. Cayuga County National Bank*, 86 N.Y. 75 (1881).

⁶⁰ See RESTATEMENT, RESTITUTION § 65 (1937); RESTATEMENT, CONTRACTS § 480 (1932); e.g., *Southern Bldg. & Loan Ass'n v. Argo*, 234 Ala. 611, 141 So. 545 (1932); *Bell v. Anderson*, 74 Wis. 638, 43 N.W. 666 (1889).

⁶¹ E.g., *Lightner v. Karnatz*, 258 Mich. 74, 241 N.W. 841 (1932); *Jones v. McGonigle*, 327 Mo. 457, 37 S.W.2d 892 (1931); *Allerton v. Allerton*, 50 N.Y. 670 (1872).

⁶² *Leeper v. Beltrami*, 53 Cal.2d 195, 211, 347 P.2d 12, 23, 1 Cal. Rptr. 12, 23 (1959); *Crouch v. Wilson*, 183 Cal. 576, 191 Pac. 916 (1920); *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593 (1907); *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369 (1898); *Gifford v. Carvill*, 29 Cal. 589 (1866). *But cf.* *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977 (1941); *More v. More*, 133 Cal. 489, 65 Pac. 1044 (1901).

This requirement of a pre-action offer of restoration 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.⁶³ 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,⁶⁴ 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.⁶⁵ Yet, if the plaintiff does not make an offer to restore, or if he fails at the trial to prove that he made such an offer, he may lose his remedy entirely.

Of course dangers of this kind can be avoided by careful lawyering. But as Professor Patterson has noted, restitution claims may involve small sums and may be prosecuted without exquisite care.⁶⁶ 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.

⁶³ The most extensive judicial discussions of the situations in which a pre-action offer of restoration is unnecessary are contained in dicta in *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593 (1907) and *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369 (1898). The following is the usual classification: *One*. 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*, 147 Cal. 739, 82 Pac. 436 (1905) (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). *Two*. 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., *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593 (1907); *Sutter St. R.R. v. Baum*, 66 Cal. 44, 4 Pac. 916 (1884). *Three*. Where the thing received by the plaintiff is of no value. See, e.g., *Kelley v. Owens*, 120 Cal. 502, 47 Pac. 369 (1898). *Four*. Where, without fault of the plaintiff, it became impossible for him to restore before he discovered the ground for rescission. See, e.g., *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); *More v. More*, 133 Cal. 489, 65 Pac. 1044 (1901); *Stegeman v. Vandevanter*, 57 Cal. App.2d 753, 135 P.2d 186 (1943); *Zeller v. Milligan*, 71 Cal. App. 617, 236 Pac. 349 (1925). Cf. *Seeger v. Odell*, 18 Cal.2d 409, 115 P.2d 977 (1941).

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., *California etc. Co. v. Schiappa-Pietra*, 151 Cal. 732, 91 Pac. 593 (1907); *Hartwig v. Clark*, 138 Cal. 668, 72 Pac. 149 (1903). 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. Olson*, 177 Ill. 298, 52 N.E. 482 (1898); *Herbert v. Stanford*, 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.

⁶⁴ Cf. *Pendell v. Warren*, 101 Cal. App. 407, 231 Pac. 658 (1929) (rescinding vendee liable for the value of the use of the truck he purchased for the time, beyond period necessary to test it, during which he had the possession and use of it).

⁶⁵ See, e.g., *Crouch v. Wilson*, 133 Cal. 576, 191 Pac. 916 (1920) (letter offering "to rescind," but without specific offer to restore, insufficient).

⁶⁶ *Patterson, Improvements in the Law of Restitution*, 40 CORNELL L.Q. 667 (1955).

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.⁶⁷ 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,⁶⁸ 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.⁶⁹ 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 that 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 with an offset for its value being permitted to the defendant.⁷⁰

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.⁷¹ Yet, in *Alder v. Drudis*⁷² 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. The judgment was made despite the fact that there was no showing by the plaintiff of a rescission—indeed,

⁶⁷ CAL. CIV. CODE § 3300. See generally RESTATEMENT, CONTRACTS § 329 (1932) and CAL. ANNOT., RESTATEMENT, CONTRACTS § 329 (1933).

⁶⁸ *E.g.*, *Alderson v. Houston*, 154 Cal. 1, 96 Pac. 884 (1908).

⁶⁹ *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 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 buyer's 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 CAL. ANNOT. RESTATEMENT, CONTRACTS § 333 (1933).

⁷⁰ For instance, in *Grosse v. Petersen*, 30 Cal. App. 482, 158 Pac. 511 (1916), 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 with § 349 (1932).

⁷¹ See generally RESTATEMENT, CONTRACTS § 349 (1932).

⁷² 30 Cal.2d 372, 182 P.2d 195 (1947).

despite the fact that the plaintiff, before bringing the action, had refused the defendant's offer to rescind.

It should be noted that damages measured by the cost of plaintiff's performance 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 total 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 that have been drawn with respect to the requirement of restoration strongly suggest the need for legislative reform. But should a unitary rescission procedure be developed, 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 administering 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 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.⁷³

Conditional judgments of the kind here contemplated are entered now as a matter of course in actions to obtain a rescission, as authorized

⁷³ 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 Bldg. Co. v. Mensor*, 120 Cal. App. 485, 8 P.2d 171 (1932). See also *O'Meara v. Halden*, 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*, 183 Cal. 576, 191 Pac. 916 (1920). 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.

by Section 3408 of the Civil Code.⁷⁴ And while conditional judgments are generally regarded as equitable devices,⁷⁵ 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 cases⁷⁶ and, today, in other jurisdictions, courts of law either with⁷⁷ or without⁷⁸ specific legislative authorization frequently make 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 rescission⁷⁹ and a District Court of

⁷⁴ See, e.g., *Loud v. Luse*, 214 Cal. 10, 3 P.2d 542 (1931); *Campbell v. Kennedy*, 177 Cal. 430, 170 Pac. 1107 (1918); *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., *Conlin v. Studebaker Bros. Co.*, 175 Cal. 395, 165 Pac. 1009 (1917). Yet, the California courts, in view of the provisions of Section 1691 of the Civil Code, have consistently refrained from using the conditional judgment as a technique for protecting the defendant, yet at the same time have permitted the plaintiff to recover in an action at law without a prior offer to restore. E.g., *Crouch v. Wilson*, 183 Cal. 576, 191 Pac. 916 (1920).

⁷⁵ It has often been stated the courts of law cannot enter conditional judgments. See, e.g., Note, 29 COLUM. L. REV., 791, 792 (1929); RESTATEMENT, CONTRACTS § 481, comment c (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*, 1 Cro. Eliz. 67 (1587).

⁷⁶ E.g., *Bentley v. Hurlburt*, 153 Cal. 796, 96 Pac. 890 (1908) (remittitur).

⁷⁷ Recently, the Legislature of New York, on the recommendation of the New York Law Revision Commission, N.Y. LAW REV. COMM'N REP., REC. & STUDIES 35, 37 (1946), 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 that is void or voidable because of fraud, misrepresentation, mistake, duress, infancy or incompetency, and who, in an action or proceeding or by way of defense or counterclaim, seeks rescission, restitution, a declaration or judgment that such transaction is void, or other relief, whether formerly denominated legal or equitable, dependent upon a determination that such transaction was void or 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, and may otherwise in its judgment so adjust the equities between the parties that unjust enrichment is avoided. N.Y. CIV. PRAC. ACT. § 112-g.

⁷⁸ The following cases, which are discussed in Patterson, *Restoration of Benefits Received by One Entitled To Avoid a Transaction*, N.Y. LAW REV. COMM'N REP., REC. & STUDIES, 41, 57 n.104 (1946), all indicate that a court of law may enter a conditional judgment to assure restoration in a rescission action: *Lackovic v. Campbell*, 225 Mich. 1, 195 N.W. 798 (1923); *Minnehoma Oil Co. v. Florence*, 92 Okla. 17, 217 Pac. 443 (1923); *George v. Braden*, 70 Pa. 56 (1871); *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 *Conlin v. Studebaker Bros. Co.*, 175 Cal. 395, 165 Pac. 1009 (1917), 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.

⁷⁹ In *Alder v. Drudis*, 30 Cal.2d 372, 182 P.2d 195 (1947), 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."

Appeal has approved the use of a conditional order for a new trial as an appropriate means for achieving the same substantive result.⁸⁰

It would seem, therefore, that the most expeditious and equitable solution to the uncertainties arising out of the restoration requirement 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.

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.

RESTORATION WHEN RELEASE RESCINDED

As indicated above, a conditional judgment would in most cases assure justice to both the plaintiff and defendant in rescission cases. 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, ancillary, to rescind a release which he had previously given to the defendant. The problem is illustrated by the recent decision in *Carruth v. Fritch*.⁸¹ 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 estab-

⁸⁰ 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 CALIF. L. REV. 150 (1947).

⁸¹ 36 Cal.2d 426, 224 P.2d 702 (1950). Compare *O'Meara v. Haiden*, 204 Cal. 354, 268 Pac. 334 (1928).

lished 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 the risks of the law suit which he had paid a consideration to be spared, would seem entitled to have the consideration with which he parted returned to him. Yet there would be no basis upon 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.⁸² Second, 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 recognized, however, that in some such cases the plaintiff might be financially unable to respond to a judgment for defendant.

⁸² See *Ploof v. Somers*, 282 App. Div. 798, 123 N.Y.S.2d 5 (1953).