Recessions at Law and in Equity

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discharge on the basis of unstated charges of undisclosed informants, it is clear that this procedure should be highly exceptional. Except in rare instances the employee should be allowed to ask for a bill of particulars, and, wherever possible, be allowed to cross-examine.

Finally, those charged with carrying out the program must see clearly the nature and the weight of the responsibility placed upon their shoulders by the factors we have discussed. Far more important than the wording of the paper program will be the spirit in which it is executed.

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RESCISSON AT LAW AND IN EQUITY

It is said that when one party to an executory contract has a right to rescind the contract, he may satisfy the requirements of a unilateral rescission and then bring an action at law; or he may seek rescission in equity. The distinction is plain. In the one case the contract no longer exists, it having been terminated by the prior rescission; in the other the contract continues to exist until set aside by the equity decree. Where the attempt to rescind has been effectual, the rescinding party may seek restitution. His action is then in quasi

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1 The scope of this comment is limited to the manner in which a rescission may be effected. Rescission and damages are alternative and inconsistent remedies. Karapetian v. Carolan (1948) 83 A.C.A. 484, 188 P. (2d) 809. This case holds that the election is not final until the rescission is "effectual." Contra: Altman v. Bautzer (1942) 54 Cal. App. (2d) 543, 129 P. (2d) 458. Cal. Civ. Code §§ 1689, 3406 enumerate the grounds for rescission. (Rescission under the Uniform Sales Act, Cal. Civ. Code §§ 1785, 1789(1)(d) is not here considered. Insurance Code § 359, formerly section 2580 of the Civil Code, provides for the rescission of insurance contracts in certain situations.)


5 Leland v. Craddock (1947) 83 A.C.A. 102, 187 P. (2d) 803; cases cited supra note 2; American Type Founder's Co. v. Packer (1900) 130 Cal. 459, 62 Pac. 744; Loaiza v. Superior Court (1899) 85 Cal. 11, 24 Pac. 707; and see Reserve Oil & Gas Co. v. Metzenbaum (1948) 84 A. C.A. 961, 968, 191 P. (2d) 796, 800.

6 "A bill in equity is an action brought to rescind, and is not based on any idea, or on any theory, that the contract has already been rescinded, as in an action at law." New York L. Ins. Co. v. Sisson, supra note 4 at 411; Bullard Shoals Mining Co. v. Spencer (1923) 208 Ala. 663, 95 So. 1.
contract,\footnote{GLENN, RESCSSION FOR FRAUD IN SALE OR PURCHASE OF GOODS—QUASI CONTRACTUAL REMEDIES AS RELATED TO TROVER AND REPLEVIN (1936) 22 VA. L. REV. 859. But compare: “This right to restitution would seem to be in reality nothing more than an alternative remedial right arising from the violation of the contract. Accurately speaking, therefore, it is not a quasi contractual right . . . .” WOODWARD, THE LAW OF QUASI CONTRACTS § 260 (1913).} based on a promise implied in law to return the consideration paid. If the consideration is land or personal property of a unique character, the action may be in equity for specific restitution.\footnote{Alder v. Drudis (1947) 30 Cal. (2d) 372, 182 P. (2d) 195; RESTATEMENT, CONTRACTS § 354 (1932).} Where the attempt to rescind has been ineffectual, or if no such attempt has been made, the aid of a court of equity is necessary, since there is no implied contract upon which to base an action at law.\footnote{Jensen v. Harry H. Culver & Co. (1932) 127 Cal. App. Supp. 783, 15 P. (2d) 907, approved in Harry H. Culver & Co. v. Superior Court (1933) 129 Cal. App. 589, 19 P. (2d) 43.} As a rescission contemplates restoring the parties to the \textit{status quo ante},\footnote{O'Keefe v. Routedge (1940) 110 Mont. 138, 103 P. (2d) 307; Dreiske v. Los Angeles I. S. Corp. (1936) 13 Cal. App. (2d) 59, 56 P. (2d) 299; Gould v. Cayuga County National Bank (1881) 82 N.Y. 75; cf. Hegel v. Hanna (1919) 43 Cal. App. 218, 184 Pac. 398; 1 BLACK, RESCSSION AND CANCELLATION § 1 (2d ed. 1929); Woodward, \textit{op. cit. supra} note 7, § 26; 12 C. J. S. 1003; 17 C. J. S. 919.} it is generally required that there be notice of the election to rescind and an offer of restoration of anything of value received.\footnote{O'Meara v. Haiden (1928) 204 Cal. 354, 268 Pac. 334; Zeller v. Milligan (1925) 71 Cal. App. 617, 236 Pac. 349; 5 WILLISTON, CONTRACTS § 1460A (rev. ed. 1937); RESTATEMENT, CONTRACTS §§ 349, 480 (1932); RESTATEMENT, RESTITUTION § 65, Comment d (1937); (1935) 23 CALIF. L. REV. 638; (1931) 19 CALIF. L. REV. 424.} Notice and offer to restore may be made in the suit in equity,' but must precede an action at law.' A court with equity powers is able to return both parties to substantially their original situation, whereas a court of law may entertain an action to secure the fruits of rescission to the plaintiff only after the defendant's consideration has been returned. The selection between the two remedies will determine questions of jurisdiction, joinder of actions, jury trial, attachment, completeness of remedy and statutes of limitation.\footnote{Gilbert v. Rothschild (1939) 230 N.Y. 66, 19 N.E. (2d) 785; Rosemead v. Shipley (1929) 207 Cal. 414, 278 Pac. 1038; 6 BANCROFT, CODE PLEADING AND PRACTICE 3308 (10 yr. supp. 1937); McCLENTOCK, EQUITY § 82 (1936); 5 WILLISTON, CONTRACTS § 1529 (rev. ed. 1937); RESTATEMENT, CONTRACTS § 481, Comment a (1932).} Hence even in code jurisdictions the distinction is of practical importance.

\footnote{Comment (1933) 21 CALIF. L. REV. 130. \textit{Jurisdiction}: A municipal court has original jurisdiction of an action in equity to rescind a contract where the demand is less than $2000. CAL. CODE CIV. PROC. § 89. In localities where there are no municipal courts, if the action is in equity, original jurisdiction will be in the superior court, but if the action is at law, the jurisdiction will be in the class A justice's courts where the demand is less than $1000 or, if there is no class A court, the jurisdiction will be in the
The California Civil Code recognizes the distinction in providing for the termination of contracts either by unilateral rescission or by court decree. A rescission without the assistance of the court may be accomplished, where the statutory grounds exist, by giving prompt notice of the election to rescind and offering the restoration of any value received. An offer of restoration is not made insufficient by the fact that it is conditioned upon receiving restitution. A court granting rescission may require that the party against whom it is adjudged be restored to substantially the same position as if the contract had not been made. In California confusion has resulted from the requirement of the old decisions that the rule as to offer of restoration class B justice's court where the demand is less than $300. CAL. CODE CIV. PROC. § 112, (1), (2). Joinder: CAL. CODE CIV. PROC. § 427 (1) permits uniting several causes of action in the same complaint where they all arise out of contracts express or implied. An action at law on a rescission is an action on an implied contract and hence could be joined with other contractual actions, whereas it would seem that an action to rescind in equity has no contractual basis and could not be so joined. (1933) 21 CALIF. L. REV. 130. Jury Trial: In Lawrence v. Ducommun (1936) 14 Cal. App. (2d) 396, 58 P. (2d) 407, the verdict of a jury in an action for rescission in equity was held to be advisory only. A plaintiff who has not completed the prior rescission may thus be denied a jury trial, although it is his constitutional privilege if the action is at law. Ito v. Watanabe (1931) 213 Cal. 487, 2 P. (2d) 799. Attachment: CAL. CODE CIV. PROC. § 537: "The plaintiff . . . may have the property of the defendant attached . . . 1. In an action upon a contract, express or implied, for the direct payment of money . . . ." Attachment, then, is a provisional remedy which may be used when the plaintiff has rescinded by his own act, but may not be used if the plaintiff seeks rescission by the court. However, it should be noted that if the action is based on an implied contract attachment will be available even though equitable relief is sought. Stanford Hotel Co. v. Schwind Co. (1919) 180 Cal. 348, 181 Pac. 780. Statutes of Limitation: A plaintiff who rescinds by his own act creates a new obligation upon which the statute commences to run at that time; therefore, under CAL. CODE CIV. PROC. § 339 such a plaintiff may bring his action at law within two years after the unilateral rescission. Taback v. Greenberg (1930) 108 Cal. App. 759, 292 Pac. 279. A plaintiff who seeks rescission in equity on the ground of fraud or mistake will be governed by the Code of Civil Procedure § 338(4), which prescribes a three-year period of limitation. If the ground of rescission is not fraud or mistake, the catch-all four-year period, CAL. CODE CIV. PROC. § 343, would seem to apply. However, a party wishing to rescind must act promptly, and will almost certainly be held deprived of his action by laches if he waits the full statutory period. Cases cited note 57, infra.

16 CAL. CIV. CODE §§ 1688, 1689, 1691 (rescission by act of one party), 3406-3408 (rescission adjudged by the court).

17 CAL. CIV. CODE § 1691(2). Where rescission is pleaded as a defense, or sought in a cross-complaint to an action on the contract, the requirement of notice prior to action is not enforced. Lawrence v. Ducommun, supra note 14; Elrod-Oas Home Bldg. Co. v. Mensor (1932) 120 Cal. App. 485, 8 P. (2d) 171. In O'Meara v. Haiden, supra note 11, plaintiff was allowed to offer to rescind and restore the consideration for a release after defendant had pleaded the release in the action. Plaintiff could rescind by a timely offer even though the offer was made after the commencement of the action.

18 CAL. CIV. CODE § 3408. "The whole doctrine of restoration is equitable, and requires merely that the party against whom rescission is adjudged shall be no worse off than before the contract." Brundy v. Candy (1915) 50 Mont. 454, 477, 148 Pac. 315, 322. The court was considering what is now § 8732 MONT. REV. CODES ANN. (1935), a copy of the California code section. Accord: Hegel v. Hannas, supra note 10.
prior to action applied in both classes of rescission. The confusion was increased in 1932 when it was held that an action on the common counts alleging a prior rescission for fraud sounded essentially in fraud and deceit, and was not an action upon a contract express or implied so as to sustain an attachment. Two district court of appeal opinions construed this to mean that the action was equitable, and therefore cognizable only in the Superior Court. The leading cases of Philpott v. Superior Court and McCall v. Superior Court somewhat clarified this situation in 1934. In the Philpott case such an action, based on a prior rescission, was recognized as one at law. This is so regardless of the ground for rescission and notwithstanding a prayer for rescission by the court. The McCall case expressly overruled the prior decisions and held that a plaintiff who joined a count for fraud (alleging a rescission and offer to restore) with a prayer for equitable relief and a common count was entitled to an attachment for so much of the action as was on a contract implied in law. Although these holdings reaffirmed the distinc-

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19 Crouch v. Wilson (1920) 183 Cal. 576, 191 Pac. 916; California Farm & Fruit Co. v. Schiappa-Pietra (1907) 151 Cal. 732, 91 Pac. 593; Kelley v. Owens (1898) 120 Cal. 502, 47 Pac. 369; Herman v. Haffenegger (1880) 54 Cal. 161.


22 (1934) 1 Cal. (2d) 512, 36 P. (2d) 635.

23 (1934) 1 Cal. (2d) 527, 36 P. (2d) 642.

24 The action being one at law for less than $2000, it was within the jurisdiction of the municipal court rather than the superior court, and a writ of prohibition to prevent the superior court from transferring the action was denied. The court did not consider CAL. CODE CIV. PROC. § 89(1) (c): "Municipal court shall have original jurisdiction of civil cases and proceedings as follows: . . . (c) To cancel or rescind a contract, when such relief is sought in connection within an action to recover money, not exceeding two thousand dollars ($2000) . . . ." This section was enacted in 1933 (Cal. Stats. 1933, p. 1811) and would justify the result reached in the Philpott case even if the court had found the action to be in equity. Glass v. Bank of America etc. Ass'n (1936) 17 Cal. App. (2d) 645, 62 P. (2d) 764; Fairbairn v. Eaton, supra note 3.

25 Supra note 22, at 524, 36 P. (2d) at 641.


27 It should be noted that only where questions of attachment, jurisdiction, or the like are raised is the attention of the court fully centered upon the problem of the equitable or legal nature of the action. In the instant case the plaintiff sought a money judgment and the equitable relief of cancellation of a written instrument. A court of equity
tion between rescission at law and in equity in accordance with the Civil Code and the weight of authority, several problems remain to be resolved, viz.: Is notice and offer to restore a condition precedent to a rescission in equity as well as to a rescission effected unilaterally? When is the action in equity rather than at law? May the common counts be used in pleading the action at law?

I. Offer of Restoration as a Condition Precedent to Rescission.

It has been doubted whether restoration should be a condition precedent to the action at law, at least where the ground of the rescission is fraud. Nevertheless, the Civil Code requires an offer of restoration, with specified exceptions. There is even less reason for the requirement in equity, where the decree can protect the rights of the defendant as fully as those of the plaintiff. This is an additional and more onerous burden than the offer to restore in the complaint in equity, which is regarded as sufficient in most jurisdictions. Although California decisions required the prior notice and offer to restore in both law and equity since an early date, numerous exceptions were soon developed to mitigate the rule: (1) where the thing received by the plaintiff is of no value whatever to either of the parties; (2) where the plaintiff has merely received the individual promissory note of the defendant; (3) where the contract is absolutely void; (4) where it clearly appears that the defendant could not possibly have been injuriously affected by a failure to restore, e.g., in those cases of fraud where plaintiff is entitled in any event to retain what he has received; (5) where the taking of an account is necessary, or "The sum is to be liquidated by an adjudication based will retain jurisdiction to render a money judgment where necessary to the equitable relief. The plaintiff did not lose his right to an attachment by seeking relief in equity since his action was based upon a prior completed rescission.

29 (1929) 29 Col. L. Rev. 791.
31 Authorities, supra note 12; Perry v. Boyd (1899) 126 Ala. 162, 28 So. 711; 12 C. J. S. 1013; 17 C. J. S. 922.
32 Gifford v. Carvill (1866) 29 Cal. 589; cases cited supra note 19.
33 Cal. Civ. Code § 1691(2) ("He must restore to the other party everything of value which he has received from him under the contract . . . ") McNeese v. McNeese (1923) 190 Cal. 402, 213 Pac. 36; Kelley v. Owens, supra note 19.
34 Kelley v. Owens, supra note 19.
35 Kelley v. Owens, supra note 19; McCracken v. City of San Francisco (1860) 16 Cal. 591 (in which Field, C. J. suggested that since the two justices sitting could not agree on the necessity of restoration, plaintiff should either make a reconveyance or await a change on the bench)
on evidence of facts independent of the terms of the contract itself. . . ." ("... in such case... an offer to refund such sum as shall be decreed is sufficient offer to do equity.");\[^{37}\] (6) where, without any fault of plaintiff, there have been peculiar complications which make it impossible for plaintiff to offer full restoration, although the circumstances are such that a court of chancery may by final decree fully adjust the rights of the parties;\[^{38}\] (7) "The statute itself dispenses with the necessity of such an offer, where the other party is himself unable to restore what he has received."\[^{39}\] These exceptions, applied more liberally in equity,\[^{40}\] to a considerable extent swallow the rule.

Two arguments may be made in favor of the requirement of a prior offer of restoration when the action is in equity for a rescission: (1) notice and tender might result in mutual restoration and thus avoid the lawsuit, and (2) the defendant should not be required to bring a separate action to recover his property. Where any of the above listed exceptions apply, however, the defendant is denied the opportunity for mutual restoration until the action is commenced. There is no greater likelihood that a lawsuit will be avoided where the


\[^{40}\] The majority of these exceptions were first expressed as \textit{dicta} in Kelley v. Owens, \textit{supra} note 19, an action to rescind a contract to exchange land for stock on the ground of fraud. The lower court directed plaintiff to reconvey to the defendant, but on appeal the judgment was reversed on the ground that although there were certain exceptions to the offer of restoration, plaintiff had not brought his case within any one of them. "It is evident... that he 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." 120 Cal. at 510, 47 Pac. at 371. The language of the court shows a lack of appreciation of the distinction between the action at law and in equity.

Comment (1931) 19 \textit{Calif. L. Rev.} 424; and see California annotations to the \textit{Restatement, Restitution} § 65, Comment \(d\) (1937). It is interesting to compare the exceptions in the \textit{Restatement, Contracts} § 349 (1932): "... (2) A failure to offer to return the performance received does not make restitution unavailable as a remedy if (a) it was wholly worthless; or (b) it has been destroyed or harmed by the defendant or has perished or deteriorated because of defects constituting a breach of the defendant's contract; or (c) it is merely money paid by the defendant, the amount of which is credited to him; or (d) it is for which a price is apportioned by the contract and that price is not included in the demand for restitution; or (e) it constitutes a comparatively small part of the whole consideration and either is of such a nature that its return has been from the time of its receipt impossible, or it has been disposed of by the plaintiff without reason to know of the defendant's breach, and its value can be determined and credited to the defendant. (3) An offer to return the consideration is not made insufficient by the fact that it is conditional on the making of restitution by the defendant also." See also \textit{Restatement, Contracts} § 480 (1932); \textit{Restatement, Restitution} § 65 (1937).
exceptions do apply, and there is good reason for facilitating the recovery of the plaintiff, particularly in cases of fraud. The second argument loses force when the power of a court of equity to protect the rights of the defendant in its decree is considered.\textsuperscript{41} In a number of actions a failure to offer to restore has been excused on this ground.\textsuperscript{42}

The \textit{McCall} case referred to the California requirement of notice and offer of restoration prior to the bringing of an action to have a rescission decreed,\textsuperscript{43} but no subsequent case has been found which expressly discusses this point. However, in \textit{Seeger v. Odell},\textsuperscript{44} an action in equity to set aside a mortgage foreclosure sale, rescind an oil lease and quiet title to land conveyed on the basis of fraudulent misrepresentations of defendants, the court answered the contention that plaintiff had not properly offered to make the necessary restitution by saying: “It is well established, however, that a court granting equitable relief has the power to make its decrees contingent upon compliance by the plaintiff with certain conditions.”\textsuperscript{45} Plaintiff's offer in their complaint to “do and perform all things of them in equity required by the court” was held to be a sufficient offer of restoration which would justify the court in conditioning the decree upon payment of the amount of the mortgage debt. This was not a case where the judgment would be such that any sum the plaintiff was bound to restore could be easily subtracted therefrom,\textsuperscript{46} nor would the mortgage debt come within any of the above enumerated exceptions. In reversing a judgment for defendant on the pleadings and holding that such a complaint stated a cause of action, the court thus tacitly repudiated the requirement of prior restoration in equity. But elimination of the former California rule does not eliminate the necessity of restoration altogether. Thus in a later case seeking specific restitution...

\textsuperscript{41}Mason v. Madson (1931) 90 Mont. 489, 4 P. (2d) 475; Spreckels v. Gorrill (1907) 152 Cal. 383, 92 Pac. 1011; More v. More (1901) 133 Cal. 489, 65 Pac. 1044, 66 Pac. 76; 5 \textit{WELLSTON, CONTRACTS} § 1529 (rev. ed. 1937); \textit{RESTATEMENT, CONTRACTS} § 481 (1932).


\textsuperscript{43} \textit{Supra} note 23 at 535, 36 P. (2d) at 646.

\textsuperscript{44} (1941) 18 Cal. (2d) 409, 115 P. (2d) 977.

\textsuperscript{45} \textit{Id.} at 417, 115 P. (2d) at 982.

\textsuperscript{46} That is, plaintiff had waived the tort and was not seeking money damages, but return of real property and the cancellation of encumbrances upon it. \textit{RESTATEMENT, RESTITUTION} § 65 (1937): “The right of a person to restitution for a benefit conferred upon another in a transaction which is voidable for fraud or mistake is dependent upon his return or offer to return to the other party anything which he received as part of the transaction, or, where specific restoration is not required ... its value, except where such a thing ... (f) consists of money which can be credited if restitution is granted.”
tion, a remedy which approximates that reached by rescission, it was held that the trial court erred in not conditioning the decree upon restoration by the plaintiff. "It is not necessary that plaintiff should have made an offer to return the consideration, but the decree for specific restitution may be made conditional upon such return," said the court. "California authorities dealing with the rescission of contracts illustrate this rule." In support of this statement, the court cited Civil Code sections 1691 (2) and 3408 and the cases noted in the California Annotations to the Restatement of Contracts, section 349.

As further evidence of the change in attitude of the courts, the case of Engle v. Farrell should be considered. This was an action at law, on the common counts, to recover the purchase price paid for lands fraudulently alleged to contain oil. Although the contract was executed and title to the lands had passed to plaintiff, the trial court held that the notice of rescission was timely and conditioned the denial of a new trial upon the plaintiff giving the County Clerk a deed with instructions to deliver it to the defendant when the judgment was paid in full. The district court of appeal affirmed the action of the trial court on the ground that any error committed was beneficial, not prejudicial, so far as defendants were concerned. A hearing was denied by the supreme court, thereby casting a shadow of disapproval over the early case of Gifford v. Carvill, in which the same procedure—denial of a motion for a new trial on condition that plaintiff restore—was held insufficient to satisfy the requirement of a timely restoration. This unique device would eliminate the necessity for prior restoration in an action at law, were it not for the specific requirements of Civil Code section 1691(2). The substantive requirements of this code section would seem to render the use of the device improper, because it necessarily implies a prior erroneous judgment.

California is now in accord with the rules of the Restatements of Contracts and Restitution, as well as the weight of authority, in requiring restoration or offer of restoration as a condition precedent to the action at law but not as a condition precedent to the action in equity, where the decree of the court can protect the rights of the defendant.

II. When is the Action at Law or in Equity?

The distinction between the two types of rescission recognized by the Civil Code was reaffirmed by the supreme court in the Philpott and McCall cases. It may be said, however, that such a distinction is

47 Alder v. Drudis, supra note 8.
48 Supra note 8, at 384, 182 P. (2d) at 202.
50 Supra note 32.
purely conceptual, for there is no substantive difference in the results of the two procedures. The remedy is rescission of the contract and a restoration of the parties to their former positions, rather than punitive or compensatory damages. Whatever the nature of the action, legal or equitable, the real question to be decided by the court is whether or not the plaintiff had a right to rescind. If that right is found to exist, relief should be granted regardless of the requirements of *indebitatus assumpsit* or of ancient chancery jurisdiction. Confusion is created by the survival of two actions for rescission having their respective origins in law and equity, with but a slight difference in their substantive requirements (namely, offer of restoration). A party who has chosen to rescind must further choose between two alternative actions with procedural and remedial differences which make one or the other more advantageous in a given situation. His selection will necessarily depend upon these advantages, as well as upon the nature of the consideration to be recovered and the appropriate relief. A plaintiff whose demands may be satisfied by an unconditional money judgment may rescind and bring an action at law; when more complete relief such as specific restitution or an accounting is desired, he may bring his action in equity, where the court may confirm the prior rescission or itself terminate the contract. That the distinction is not this facile in application, however, may be seen by a specific example.

Consider the situation of a defrauded purchaser of an interest in real property to whom title has been transferred. If he elects to rescind, he must do so promptly upon discovering the facts which entitle him to rescind, and must offer to restore everything of value

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51 1 Pomeroy, *Equity Jurisprudence* 142 (5th ed. 1941).
52 "Under our form of procedure whereby the distinction between forms of action is abolished, the court could in this action administer equitable relief, regardless of the question whether, under former systems of jurisprudence, the action would be deemed an action in *assumpsit* for the money paid, or an action in equity to compel rescission and a return of the consideration." Spreckels v. Gorrill, *supra* note 41, at 494, 92 Pac. at 1016.
53 "Legal and equitable relief are administered in the same forum, and according to the same general plan. A party cannot be sent out of court, merely because he is not entitled to relief at law, or merely because he is not entitled to relief in equity, as the case may be. He can be sent out of court only where, upon the facts, he is entitled to no relief, either at law or in equity." Grain v. Aldrich (1869) 38 Cal. 514.
54 Authorities *supra* note 14.
56 Prewitt v. Sunnymead Orchard Co. (1922) 189 Cal. 723, 209 Pac. 995; Wilcox v. Lattin (1892) 93 Cal. 588, 29 Pac. 226 (a judgment of cancellation may affirm a prior rescission).
57 Neet v. Holmes (1944) 25 Cal. (2d) 447, 154 P. (2d) 854 (rescission denied because of laches of plaintiff and ambiguity of the disaffirmance). In Davis v. Rite-Lite
which he has received from the other party under the contract, *i.e.*, he must tender a deed. Section 1691(2) of the Civil Code specifically permits the offer of the deed to be conditional upon like restoration by the defendant, and requires no restoration if the other party "is unable or positively refuses" to restore. In addition, if the purchaser can bring his action under one of the numerous exceptions to the requirement of restoration, he may rescind without the necessity of anything other than prior notice and an offer of restoration in the complaint. In such a situation, where offer of the deed is either excused or refused, is the action, when brought, at law or in equity?

Some courts would hold that the action should be in equity, even though the completion of the unilateral rescission be conceded. The argument is made that in the absence of prior restoration the defendant is not unjustly enriched; hence no implied contract upon which to base an action at law exists. The remedy at law is inadequate to restore the *status quo ante*, whereas a court of equity can protect the defendant by requiring plaintiff to reconvey as a condition of the decree, or the deed to the plaintiff may be canceled. These arguments are answered first by the language of section 1691 of the Civil Code, which contemplates a completed rescission without restoration in certain circumstances. The contract has ceased to exist and

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Sales Co. the court said: "The plaintiff cannot wait the full statutory period for bringing an action based on fraud without prior notice of rescission, and then bring an action therefor, in the absence of the most unusual circumstances. If he would rescind either by notice to the seller, or action for rescission, he must act promptly." (1937) 8 Cal. (2d) 675, 67 P. (2d) 1039.


63 To the effect that the exceptions apply to notice as well as the offer to restore, see Zeller v. Milligan, *supra* note 11. However, there must be at least some type of notice. McGuire v. Rommel, *supra* note 13; Clanton v. Clanton, *supra* note 42. But the notice may be general, and need not specify the true ground. Hull v. Ray (1930) 211 Cal. 164, 294 Pac. 700.

64 This was the situation in the McCall case, where the trial court had previously confirmed the prior rescission and purported to re-invest defendants with the title to the real property and restore all things of value received from them by the plaintiffs. Fairbairn v. Eaton, *supra* note 3; Bullard Shoals Mining Co. v. Spencer, *supra* note 6; Homer v. Purser (1852) 20 Ala. 573. The aid of equity is necessary in the reverse of the instant situation, i.e., where plaintiff has conveyed land to defendant. Kier Corporation v. Treasure Oil Co. (1943) 57 Cal. App. (2d) 829, 136 P. (2d) 59.

65 "The procedure at common law where the power of avoidance is recognized, is based on the assumption that avoidance must precede the bringing of the action, and the status quo be restored before that time. The injured party is then treated as the owner of whatever he has parted with and is entitled to the remedies appropriate as an owner." *Restatement, Contracts* § 481 Comment a (1932). New York L. Ins. Co. v. Sisson, *supra* note 4; Glenn, *op. cit.* *supra* note 7.

66 "Appellant makes the assertion that rescission by one party cannot constitute an abandonment of a contract unless it is ultimately established by a judicial decree that the party rescinding had a right to do so. Such is not the law in California." Leland v. Craddock, *supra* note 5; Reserve Oil & Gas Co. v. Metzenbaum, *supra* note 5; 12 Am. Jur. 1031.
defendant is retaining the consideration without legal justification. Second, although admittedly equitable relief may be more complete from the standpoint of the defendant, the plaintiff, having satisfied the requirements of unilateral rescission, is entitled to an action in the nature of an action for money had and received, with the attendant benefits of an attachment and levy of execution by the sheriff. 63 Furthermore, a defendant who has resisted a rescission and refused tender of a deed should not be heard to complain that he will be unable to obtain a reconveyance without the necessity of another action. If the defendant is injured, it is a consequence of his own actions.

There are several ways in which the defendant may be protected without requiring the aid of a court of equity. If, subsequent to the offer, the deed is placed effectively beyond the control of the plaintiff, as in escrow or on deposit with the clerk of the court, title may be retransferred to defendant upon satisfaction of the judgment. Such a procedure could be required as a condition of the action at law. Again, in the previously considered case of Engle v. Farrell, 64 restoration of the parties to status quo was accomplished in an action at law by the use of the general power to conditionally deny a motion for a new trial, in effect a conditional judgment. 65 Defendant correctly contended that such an order had the effect of transforming the action into an action on the equity side to enforce a rescission and restore the parties to status quo. Where a conditional judgment is possible at law, the aid of equity to enforce a rescission would be necessary only when a money judgment is inadequate to restore the plaintiff to his prior position.

Thus conflicting considerations obscure a remedy which should be plain and effective. The position of the defrauded purchaser of an interest in real property is representative of the situation of the usual rescinding party, although the character of the consideration received poses more problems of restoration. If protection of the defendant in this situation is desired, the difficulty can best be resolved by the legislature; an amendment to the Code of Civil Procedure to permit conditional judgments in actions at law based upon rescission would enable the courts to adjust the rights of the parties without resort to procedures of dubious propriety, such as that in the Engle case. 66 The

63 Maxwell v. Jimeno (1928) 89 Cal. App. 612, 265 Pac. 885; Loaiza v. Superior Court, supra note 5.
64 Supra note 49.
65 In Vice v. Thacker, supra note 42, a conditional judgment was rendered in an action for the return of personal property, based on a prior completed rescission. "Such judgment, designed to place the parties in status quo, comports wholly with the principles of rescission and the equities of the case as the court resolved the controverted issues." Supra note 42, at 92, 180 P. (2d) at 9.
66 Note (1947) 35 Calif. L. Rev. 150.
need for clarification is more apparent when the problem of the use of the common counts in an action at law based upon a rescission is considered.

III. The Use of the Common Counts.

Although not strictly in compliance with the code provision that the complaint shall consist of a statement of the facts constituting the cause of action,67 it has been settled by repeated decisions that a complaint alleging money had and received by the defendant for the use of the plaintiff sufficiently states a cause of action.68 This, in effect, permits a plaintiff to plead a conclusion of law, and to recover if the facts proved at the trial support that conclusion. Should such a pleading be permitted when the facts relied upon consist of a completed unilateral rescission, or should additional facts setting forth the rescission and the ground therefor be required in the pleading?

Where there is a total failure of consideration, an implied promise of the defendant arises whether or not the plaintiff gives notice and rescinds;69 the common counts alone would be sufficient in such a case. The fact that failure of consideration is also one of the grounds for rescission,70 and that the rescinding party need not restore when he has received no value,71 adds to the confusion surrounding the use of the common counts.

The McCall2 case, in terms, lays down the rule that while a common count is sufficient where the contract is executory, or the action is merely to procure a return of the consideration paid and the party rescinding has received nothing of value, in other classes of rescission the plaintiff must allege facts showing that he had good right to rescind and for what cause a rescission had taken place.72 Particularly where the ground of rescission is fraud, the defendant might well wish to know when the plaintiff discovered the fraud, as a just ground of rescission may be lost by laches.73 This rule would limit the use of the

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67 CAL. CODE CIV. PROC. § 426(2).
69 This was the situation in the Philpott case, supra note 22, where the court suggested that no rescission would seem to be required other than the initiation of the action itself, and further, that the common law action of debt might also lie in such a case. Orton v. Privett (1927) 202 Cal. 754, 262 Pac. 713; Mahoney v. Standard Gas Engine Co. (1921) 187 Cal. 399, 202 Pac. 146; Richter v. Union Land & Stock Co. (1900) 129 Cal. 367, 62 Pac. 39; S. C. V. Peat Fuel Co. v. J. H. L. Tuck (1878) 53 Cal. 304; cf. Minor v. Baldridge (1898) 123 Cal. 187, 55 Pac. 783 (no rescission required where money was paid under a mistake as to performance of a condition in the contract).
70 CAL. CIV. CODE § 1689.
71 CAL. CIV. CODE § 1691(2).
72 Supra note 23.
74 E.g., Neet v. Holmes, supra note 57.
common counts to executory contracts and the total failure of consideration situation, in which there need be no rescission.

However, any rule which creates an exception by forbidding the use of the common counts in only one kind of rescission is impracticable, since the defendant will be unable to show that the particular case falls within the exception until after the pleading stage is passed and the trial has begun. By that time, when all the parties are before the court, the balance of convenience would seem to dictate that the case should be disposed of on the merits, without requiring further pleadings or delay. This problem is illustrated by the recent case of *Miller v. McLaglen*, in which the complaint was only on the common counts. Defendant objected to the introduction of evidence on the ground that this action was based upon fraud and rescission of a contract and that prior to the action plaintiff had not rescinded. The judgment that plaintiff take nothing was reversed on the ground that common counts state a cause of action in California, and on such a motion the allegations of the answer could not be considered. The court also believed that if this were an action for rescission there were so many exceptions to the requirement of notice and restoration that plaintiff could rescind and have *assumpsit* without showing that he had returned anything of value which he received.

Assuming this to have been an action on a rescission, as defendant alleged and the trial court found, there seem to be no sufficient reasons for applying a rule limiting the use of the common counts in rescission as long as they are sufficient for other actions at law. The defendant may be protected by requiring the plaintiff to amend his complaint, adding a prayer for equitable relief, when it becomes apparent that rescission is the basis of the action, or by adopting the previously suggested conditional judgment in rescission actions. Moreover, it is apparent that any injustice done the defendant by not apprising him of the facts relied upon by the plaintiff is no greater in the rescission situation than in any other action at law in which the common counts are allowed. Therefore, when the plaintiff has satisfied the requirements of unilateral rescission, *i.e.*, prior restoration or

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75 When stating the rule previously quoted, the McCall court purported to be considering the pleading problem. However, the language which the court quoted with approval from Swanston *v.* Clark, supra note 13, was a dictum that could well have been meant to apply to the substantive rule. Whatever distinction may have been drawn by the court in the McCall case, it has not been followed by subsequent decisions to date.


77 Id. at 227, 186 P. (2d) at 52.

78 The next step will be for plaintiff to introduce his evidence. If, after that, defendant cannot object, there is no way in which the McCall case "requirement" can be applied. If defendant *can* object at this stage of the trial, it would seem unduly harsh to deny plaintiff the opportunity for a judgment on the merits.
offer of restoration where required, he should be able to bring his action at law and use the common counts if he so desires.

Hugh S. Koford

Notes and Recent Decisions

ADMINISTRATIVE LAW: AGENCY AUTHORITY TO DEVELOP POLICY BY ADJUDICATION RATHER THAN RULE.

In 1941 the S.E.C. refused to approve a corporate reorganization plan until it was amended to provide that preferred stock purchased by the management while reorganization plans were before the Commission was to be surrendered to the corporation at cost plus 4% interest. The Commission stated that it was merely applying "broad equitable principles enunciated in the cases heretofore cited." The Supreme Court found that those cases did not support the Commission's decision, but the reasoning of the majority was not altogether clear. On one construction, the opinion simply said that administrative action must be tested by the basis on which it purports to rest, that the S.E.C. could not justify a new policy through a misreading of judicial decisions. A second possible construction was that the S.E.C. must promulgate new policies by rule, and not work them out by ad hoc adjudication. On remand the Commission recast its rationale, this time holding the proposed transaction to be inconsistent with Sections 7 and 11 of the Holding Company Act. The Supreme Court, adopting the first construction of its earlier decision, upheld the action and ruled that the S.E.C. had authority to develop new standards of fiduciary conduct case by case.

2 8 S.E.C. 893, 917.
3 S.E.C. v. Chenery Corporation (1943) 318 U.S. 80. Justice Frankfurter wrote the majority opinion, with Chief Justice Stone and Justices Roberts and Jackson concurring. Justices Black, Reed and Murphy dissented on the grounds that the cases on which the Commission relied adequately supported its decision, that in any event the Commission's holding was not based solely on those cases, and that to remand would merely require the Commission to go through the useless formality of submitting findings to support the decision. Justice Douglas took no part in the case.
4 See 318 U.S. at 87-89: "Since the decision of the Commission was explicitly based upon the applicability of principles of equity announced by the courts, its validity must likewise be judged on that basis.... In evolving standards of fairness and equity, the Commission is not bound by settled judicial precedents.... But the Commission did not in this case proffer new standards reflecting the experience gained by it in effectuating the legislative policy."
5 See 318 U.S. at 92: "... before transactions otherwise legal can be outlawed... they must fall under the ban of some standards of conduct prescribed by an agency of government. ... Congress itself did not prescribe the respondents' purchases.... Established judicial doctrines do not condemn these transactions. Nor has the Commission, acting under the rule-making powers delegated to it by § 11(e), promulgated new general standards of conduct."