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6/14/60

Memorandum to the Law Revision Commission

From: John R. McDonough, Jr.

Subject: Study No. 23 - Rescission

Attached is a preliminary draft of a bill designed to preserve the existing duality of rescissional remedies in the situation where one of the parties to a contract is entitled to have it extinguished, but to improve the existing statutory law by:

1. Making it clear on the face of the Civil Code (and of other codes which deal with rescission through the device of cross reference to the Civil Code) that there are the two separate remedies -- a fact which at the present time only careful research like that done by our research consultant will make manifest.
2. Eliminating a number of the existing differences between the two kinds of actions (e.g., notice and offer to restore, attachment, joinder) and thus reducing both the number of situations in which it makes a difference which remedy is pursued and the number of cases in which a party may either be trapped or create an advantage for himself by proceeding in one way rather than another.

This draft assumes that it is not possible or at least not wise to attempt to redraft the statutory law with a view of substituting a "single form of action" for the duality of rescissional remedies which presently

exists. It recognizes that the forms of action rule us from their graves and attempts to bring as much order as possible out of that situation.

Respectfully submitted,

John R. McDonough, Jr.
Member

PROPOSED BILL

SECTION 1. Chapter 2 of Title 5 of Division 3 of Part 2 of the Civil Code is hereby repealed.

SEC. 2. Chapter 2 of Title 5 of Division 3 of Part 2 of the Civil Code is enacted, to read:

Chapter 2
RESCISSION

§ 1688. A contract is extinguished by its rescission.

§ 1689. A contract is subject to rescission in the following cases only:

1. Where the consent of the party who desires rescission 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 rescission is desired or of any other party to the contract jointly interested with such party; provided that a contract is not subject to rescission for mere mistake, unless the party against whom rescission is sought can be restored to substantially the same position as if the contract had not been made;

2. Where the consideration for the obligation of the party who desires rescission fails, in whole or in part, through the fault of

the party as to whom rescission is desired;

3. Where the consideration for the obligation of the party who desires rescission becomes entirely void from any cause;

4. Where the consideration for the obligation of the party who desires rescission fails in a material respect from any cause before it is rendered to him;

5. Where all of the parties concerned desire rescission;

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

7. Where the public interest will be prejudiced by permitting the contract to stand.

8. Where the circumstances are those provided for in Sections 39, 1785, 1789, 1930 and 2314 of this code, Section 2470 of the Corporations Code or Sections 331, 338, 359, 447, 1904 and 2030 of the Insurance Code.

§ 1690. Any parties to a contract may rescind the same as to themselves by mutual agreement.

§ 1691. When a contract is subject to rescission under Section 1689 a party aggrieved may rescind the contract as to himself by manifesting his intention to do so to the other parties to the contract. Subject to the provisions of Section 1694 and Section 1781 of this code he must

(1) 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

(2) At the time of rescinding restore to the other party everything of value which he has received from him under the contract or offer to restore the same upon condition that such party do likewise, unless the latter is unable or positively refuses to do so.

§ 1692. When a contract has been rescinded in whole or in part by the mutual agreement of some or all of the parties thereto or by the unilateral action of a party pursuant to Section 1691, any party to the contract may bring an action for a declaratory judgment that such rescission has been effected or to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission and for any other relief to which he may be entitled under the circumstances. When an action is brought under this section any party thereto may demand a jury trial on any legal issue involved.

§ 1693. When a contract is subject to rescission under Section 1689 [and when the legal remedies available under this chapter are inadequate?] a party aggrieved may bring an action to have the contract rescinded as to himself by the judgment of the court and to recover any money or thing owing to him by any other party to the contract as a consequence of such rescission and for any other relief to which he may be entitled under the circumstances. Subject to the provisions of Section 1694 and Section 1781 of this code, he must

1. Give the other parties to the contract notice of his intention to bring such an action promptly upon discovering the facts which entitle him to do so if he is free from duress, menace, undue influence or disability; and

2. At the time of giving such notice restore to the other party everything of value which he has received under the contract or offer to restore the same upon condition that the other party do likewise, unless the latter is unable or positively refuses to do so.

Actions brought under this section shall be tried to the court without a jury.

§ 1694. When an action is brought pursuant to Section 1692 or Section 1693

1. Relief shall not be denied because of a delay in rescinding or because of a failure to give or delay in giving notice of rescission unless such failure or delay has been substantially prejudicial to the other party;

2. Relief shall not be denied because of a failure to restore or to offer to restore benefits received under the contract or a delay in doing so unless such failure or delay has been substantially prejudicial to the other party.

§ 1695. A person having a right of action under Section 1692 or Section 1693 may assert the same by way of defense, counterclaim or cross-complaint.

§ 1696. A stipulation that errors of description shall not avoid a contract or shall be the subject of compensation, or both, does not take away the right to have rescission adjudged for fraud, nor for mistake, where such mistake is in a matter essential to the inducement of the contract, and is not capable of exact and entire compensation.

§ 1696.1. Where a release is pleaded in answer to a cause of action asserted in a pleading, the party asserting the cause of action may serve and file a responsive pleading alleging that the release has been rescinded pursuant to Section 1691 or alleging grounds for rescission thereof under Section 1693 of this code. If such a responsive pleading is served and filed, the court shall first determine whether the release has been rescinded or whether its rescission should be adjudged. If the release is held to be valid 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 have been rescinded or if the party asserting the cause of action is entitled to rescission of the release, the release shall be accorded no effect as a defense to the cause of action; but the court shall set off against any 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 or introduced the release and if such amount exceeds any judgment rendered in favor of the party asserting the cause of action, the court shall enter judgment in favor of the party who pleaded or introduced the release in the amount of such excess.

1696.2. In an action brought pursuant to Section 1692 or 1693 of this code the court may order the party to whom relief is granted to make compensation to the other party or to do any other act which justice may require and may make its judgment conditional on compliance with the order.

SEC. 3. Section 338 of the Code of Civil Procedure is amended

[This
now seems
doubtful]

to read:

338. Within three years:

* * *

8. An action brought pursuant to Section 1693 of the Civil Code; provided that where the ground for rescission is fraud, or mistake, the cause of action shall not be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake.

SEC. 4. 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~~ An action upon any liability, existing under the laws of this State, of a spouse, relative or kindred, for

the support, maintenance, care or necessities 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 or Section 1693 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.

* * *

SEC. 5. 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 or Section 1693 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.

* * *

SEC. 6. Section 112 of the Code of Civil Procedure is amended to read:

112. Justice courts shall have original jurisdiction of civil cases and proceedings as follows:

(a) In all cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to five hundred dollars (\$500) or less, except cases at law which involve the title or possession

of real estate or the legality of any tax, impost, assessment, toll or municipal fine, and actions brought pursuant to Section 1692 of the Civil Code.

SEC. 7. Section 39 of the Civil Code is amended to read:

39. A conveyance or other contract of a person of unsound mind, but not entirely without understanding, made before his incapacity has been judicially determined is subject to rescission as provided in the-Chapter-en-Rescission Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this Code.

SEC. 8. Section 1566 of the Civil Code is amended to read:

1566. ~~CONSENT, WHEN VOIDABLE.~~ A consent which is not free is nevertheless not absolutely void, but ~~may be rescinded by the parties, in the manner prescribed by the Chapter-en-Rescission~~ is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this Code.

SEC. 9. Section 1930 of the Civil Code is amended to read:

1930. When a thing is let for a particular purpose the hirer must not use it for any other purpose; and if he does, he is liable to the letter for all damages resulting from such use, ~~or the letter may treat the contract as thereby rescinded~~ and the contract is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this Code.

SEC. 10. Section 2314 of the Civil Code is amended to read:

2314. ~~RESCISSION-OF-RATIFICATION.~~ A ratification ~~may-be-rescinded~~ when made without such consent as is required in a contract, or with an imperfect knowledge of the material facts of the transaction ratified, is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this Code but not otherwise.

SEC. 11. Section 2470 of the Corporations Code is amended to read:

2470. (a) Subject to the provisions of subdivision (b) of this section, the transfer of a certificate is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code ~~may-be-rescinded~~ and possession thereof ~~reclaimed~~ may be recovered, in any of the following cases:

(1) If the endorsement or delivery of the certificate was procured by fraud or duress.

(2) If the endorsement or delivery of the certificate was made under such mistake as to make the endorsement or delivery inequitable.

(3) If the delivery of the certificate was made without authority from the owner.

(4) If the delivery of the certificate was made after the owner's death or legal incapacity.

(b) ~~The-right-to-rescind~~ The transfer of a certificate is not ~~reclaim~~ subject to rescission and/~~the possession thereof does-not-exist~~ may not be recovered in either of the following cases:

(1) If the certificate has been transferred to a purchaser for value,

in good faith, without notice of any facts making the transfer wrongful.

(2) If the injured person has elected to waive the injury or has been guilty of laches in endeavoring to enforce his rights.

(c) Any court of appropriate jurisdiction may enforce specifically the right to ~~reclaim~~ recover the possession of the certificate or the rights with respect to rescission conferred by this section ~~to rescind the transfer~~ thereof and, pending litigation, may enjoin the further transfer of the certificate or impound it.

SEC. 12. Section 331 of the Insurance Code is amended to read:

331. Concealment, whether intentional or unintentional, ~~entitles the injured party to rescind insurance~~ makes the contract of insurance subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code.

SEC. 13. Section 338 of the Insurance Code is amended to read:

338. An intentional and fraudulent omission, on the part of one insured, to communicate information of matters proving or tending to prove the falsity of a warranty, ~~entitles the insurer to rescind~~ makes the contract of insurance subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code.

SEC. 14. Section 359 of the Insurance Code is amended to read:

359. If a representation is false in a material point, whether affirmative or promissory, ~~the-injured-party-is-entitled-to-rescind~~ the contract is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code from the time the representation becomes false.

SEC. 15. Section 447 of the Insurance Code is amended to read:

447. The violation of a material warranty or other material provision of a policy ~~,on-the-part-of-either-party-thereto,-entitles-the-other-to~~ rescind makes the contract subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code.

SEC. 16. Section 650 of the Insurance Code is amended to read:

650. Whenever a right to rescind or seek a decree rescinding a contract of insurance is given to the insurer by any provision of this part, such right may only be exercised ~~at-any-time-previous~~ prior to the commencement of an action on the contract.

SEC. 17. Section 1904 of the Insurance Code is amended to read:

1904. In marine insurance, if a representation by the insured is intentionally false in any respect, whether material or immaterial, the ~~insurer-may-rescind~~ ^{the} entire contract is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code.

SEC. 18. Section 2030 of the Insurance Code is amended to read:

~~2030. An insurer is entitled to rescind a contract of fire insurance upon~~ Upon an alteration in the use or condition of the subject matter insured from that to which it is limited by the policy, when such alteration is made without the consent of the insurer by means within the control of the insured, and increases the risk, a contract of fire insurance is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of the Civil Code.

SEC. 20. Section 1773 of the Civil Code is amended to read:

~~1773. REMEDIES OF UNPAID SELLER.~~ (1) Subject to the provisions of this act, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of the goods, as such, has:

* * *

(d) A right to rescind or seek a decree rescinding the sale as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this code and as limited by this act.

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SEC. 21. Section 1781 of the Civil Code is amended to read:

~~1781. WHEN AND HOW THE SELLER MAY RESCIND THE SALE.~~ (1) An unpaid seller having a right of lien or having stopped the goods in transitu, may rescind or seek a decree rescinding the transfer of title as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this code and may resume the property in the goods, where he expressly reserved the right to do so in case the buyer should make default, or where

the buyer has been in default in the payment of the price an unreasonable time. The seller shall not thereafter be liable to the buyer upon the contract to sell or the sale, but may recover from the buyer damages for any loss occasioned by the breach of the contract or the sale.

(2) ~~The transfer-of-title-shall-not-be-held-to-have-been-rescinded-by an-unpaid-seller~~ rights conferred on the unpaid seller by this section are not effectively exercised until he has manifested by notice to the buyer or by some other overt act an intention to ~~rescind~~ exercise such rights. It is not necessary that such overt act should be communicated to the buyer, but the giving or failure to give notice to the buyer of the seller's intention to ~~rescind~~ exercise such rights shall be relevant in any issue involving the question whether the buyer had been in default an unreasonable time before the rights of rescission ~~was~~ were asserted.

SEC. 22. Section 1785 of the Civil Code is amended to read:

1785. ~~WHEN-SELLER-MAY-RESCIND-CONTRACT-OR-SALE-~~ Where the goods have not been delivered to the buyer, and the buyer has repudiated the contract to sell or sale, or has manifested his inability to perform his obligations thereunder, or has committed a material breach thereof, ~~the-seller-may~~ totally-rescind the contract or the sale is subject to rescission as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this code. ~~by-giving-notice-of-his-election-to-the-buyer.~~

SEC. 23. Section 1789 of the Civil Code is amended to read:

1789. ~~REMEDIES-FOR-BREACH-OF-WARRANTY-~~ (1) Where there is a breach of warranty by the seller, the buyer may, at his election:

* * *

(d) Rescind or seek a decree rescinding the contract to sell or the sale as provided in Chapter 2 (beginning with Section 1688) of Title 5 of Division 3 of Part 2 of this code, and refuse to receive the goods, or if the goods have already been received, return them or offer to return them to the seller and recover the price or any part thereof which has been paid.

(2) When the buyer has claimed and been granted a remedy in any one of these ways, no other remedy can thereafter be granted.

(3) Where the goods have been delivered to the buyer, he can not rescind or seek a decree rescinding the sale if he knew of the breach of warranty when he accepted the goods, or if he fails to notify the seller within a reasonable time of the election to rescind, or if he fails to return ^{to} or/offer to return the goods to the seller in substantially as good condition as they were in at the time the property was transferred to the buyer. But if deterioration or injury of the goods is due to the breach of warranty, such deterioration or injury shall not prevent the buyer from returning or offering to return the goods to the seller and rescinding or seeking a decree rescinding the sale.

(4) Where the buyer is entitled to rescind or seek a decree rescinding the sale and elects to do so, the buyer shall cease to be liable for the price upon returning or offering to return the goods. If the price or any part thereof has already been paid, the seller shall be liable to repay so much thereof as has been paid, concurrently with the return of the goods, or immediately after an offer to return the goods in exchange for the repayment of the price.

(5) Where the buyer is entitled to rescind or seek a decree rescinding

the sale and elects to do so, if the seller refuses to accept an offer of the buyer to return the goods, the buyer shall thereafter be deemed to hold the goods as bailee for the seller, but subject to a lien to secure the repayment of any portion of the price which has been paid, and with the remedies for the enforcement of such lien allowed to an unpaid seller by Section 1773.